274 N.C. App.—No. 1 Pages 1-157

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 27, 2021

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

LINDA M. McGEE[1]

DONNA S. STROUD[2]

Judges

WANDA G. BRYANT[3]
CHRIS DILLON
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY
PHIL BERGER, JR.[4]
HUNTER MURPHY
JOHN S. ARROWOOD

ALLEGRA K. COLLINS
TOBIAS S. HAMPSON
REUBEN F. YOUNG[5]
CHRISTOPHER BROOK[6]
JEFFERY K. CARPENTER[7]
APRIL C. WOOD[8]
W. FRED GORE[9]
JEFFERSON G. GRIFFIN[10]
DARREN JACKSON[11]

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

Former Judges

WILLIAM E. GRAHAM, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
WILLIS P. WHICHARD
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS

ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS
J. DOUGLAS McCULLOUGH
WENDY M. ENOCHS
ANN MARIE CALABRIA
RICHARD A. ELMORE
MARK A. DAVIS
ROBERT N. HUNTER, JR.

[1]Retired 31 December 2020. [2]Appointed Chief Judge 30 December 2020 and sworn in 1 January 2021. [3]Retired 31 December 2020.
[4]Resigned 31 December 2020. [5]Term ended 31 December 2020. [6]Term ended 31 December 2020. [7]Sworn in 1 January 2021.
[8]Sworn in 1 January 2021. [9]Sworn in 1 January 2021. [10]Sworn in 1 January 2021. [11]Appointed 30 December 2020 and sworn in 6 January 2021.

Clerk
DANIEL M. HORNE, JR.

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF APPELLATE DIVISION STAFF

Director
Jaye E. Bingham-Hinch

Assistant Director
David Alan Lagos

Staff Attorneys
Bryan A. Meer
Michael W. Rodgers
Lauren M. Tierney
Caroline Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy
J. Eric James

ADMINISTRATIVE OFFICE OF THE COURTS

Director
McKinley Wooten[12]
Andrew Heath[13]

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Jennifer C. Peterson
Niccolle C. Hernandez

[12]Resigned 7 January 2021. [13]Appointed 8 January 2021.

COURT OF APPEALS

CASES REPORTED

FILED 20 OCTOBER 2020

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Interlocutory appeal—no substantial right—subject to dismissal—Defendant's appeal from an order denying his motion to refer the case against him (for alienation of affection, criminal conversation, and punitive damages) to a three-judge panel to review the claims' constitutionality was dismissed as interlocutory where he failed to establish a substantial right would be affected absent appellate review. The statute relied on by defendant, N.C.G.S. § 1-267.1, did not apply to common law torts. **Estes v. Battiston, 1.**

Interlocutory ruling—substantial right—depletion of trust—claim to determine rightful beneficiaries—In a case challenging amendments made to a trust and to determine the trust's rightful beneficiaries, plaintiffs were entitled to immediate review of an interlocutory ruling, in which the trial court allowed defendant's motion to pay costs (ordering the trustee to distribute trust assets to some purported beneficiaries but not others), based on their assertion that they would be deprived of a substantial right absent review because more than two million dollars had already been paid out of the trust and the ownership of the assets was in dispute. **Wing v. Goldman Sachs Tr. Co., N.A., 144.**

Preservation of issues—Batson challenge—evidence of prospective juror's race—sufficiency of record—The record was minimally sufficient to preserve for appellate review defendant's argument that the State committed a *Batson* violation (by peremptorily striking the sole Black member of the prospective jury pool), despite there being no direct evidence of the race of any of the prospective jurors and no verbatim transcript of the voir dire, because the parties' arguments at the *Batson* hearing showed no dispute regarding defendant's race and that of the removed prospective juror and therefore amounted to a stipulation. **State v. Alexander, 31.**

APPEAL AND ERROR—Continued

Right to speedy appeal—effective assistance of appellate counsel—record on appeal—sufficiency—Where it took nineteen years to docket defendant's appeal from various criminal convictions because his prior counsel failed to timely prosecute the appeal, the record was insufficient to permit direct appellate review of defendant's arguments that he was deprived of his rights to a speedy appeal and to effective assistance of counsel. Consequently, defendant's appeal was dismissed without prejudice so that he could pursue a motion for appropriate relief in the trial court and develop the facts in an evidentiary hearing. **State v. Quick, 94.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Adjudication—abuse and neglect—findings of fact—sufficiency of evidence—The trial court properly adjudicated the parties' children as abused and neglected where clear and convincing evidence supported its finding that respondent-father knew about respondent-mother's criminal charges (she took and distributed pornographic photos of one of the children and, at one point, burned down the family home) but did nothing to protect the children. Whether respondent-father believed in respondent-mother's guilt was irrelevant. **In re N.K., 5.**

Adjudication—abuse and neglect—sufficiency of evidence—The trial court properly adjudicated respondent-mother's son as abused where clear and convincing evidence supported its findings that respondent-mother took and distributed pornographic photos of the child and tried to frame her brother for it. Additionally, the trial court properly adjudicated both of respondent-mother's children as neglected where her abuse of the one child established that both children lived in an environment injurious to their welfare (N.C.G.S. § 7B-101(15)). **In re N.K., 5.**

Dispositional order—custody remaining with department of social services—best interests of the children—In an abuse and neglect case, the trial court did not abuse its discretion by ordering that the children remain in the department of social services' custody rather than placing them together in a home with relatives and frequent access to respondent-father, where the court's unchallenged findings of fact showed that it properly considered the children's best interests while evaluating all available placement options. **In re N.K., 5.**

Dispositional order—placement with a relative—statutory requirements—In an abuse and neglect case, the trial court did not abuse its discretion by declining to place the parties' children with a relative where, although respondent-father presented his half-sister and the children's great aunt as potential placements, the evidence showed that neither woman was able to provide "proper care and supervision" or a "safe home" (N.C.G.S. § 7B-903(a1)). Because the court found no relative who met the statutory requirements under section 7B-903(a1), the court was not required to make findings of fact about whether placement with a relative would be in the children's best interests. **In re N.K., 5.**

Dispositional order—visitation—improper delegation of judicial authority to third parties—In an abuse and neglect case, the visitation provisions of a dispositional order were vacated and remanded where, by forbidding respondent-mother to have any contact with her children until agreed upon by her therapist and the children's therapists, the trial court seemingly—and improperly—delegated its authority to allow and set the terms for visitation to third parties. **In re N.K., 5.**

SCHEDULE FOR HEARING APPEALS DURING 2021

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 11 and 25

February 8 and 22

March 8 and 22

April 12 and 26

May 10 and 24

June 7

August 9 and 23

September 6 and 20

October 4 and 18

November 1, 15, and 29

December 13

Opinions will be filed on the first and third Tuesdays of each month.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JONATHAN DREW ESTES, PLAINTIFF
v.
JOHN J. BATTISTON, JR., DEFENDANT

No. COA19-699

Filed 20 October 2020

Appeal and Error—interlocutory appeal—no substantial right—subject to dismissal

Defendant's appeal from an order denying his motion to refer the case against him (for alienation of affection, criminal conversation, and punitive damages) to a three-judge panel to review the claims' constitutionality was dismissed as interlocutory where he failed to establish a substantial right would be affected absent appellate review. The statute relied on by defendant, N.C.G.S. § 1-267.1, did not apply to common law torts.

Appeal by defendant from order entered 6 May 2019 by Judge Robert C. Ervin in Caldwell County Superior Court. Heard in the Court of Appeals 17 March 2020.

Marshall Hurley, PLLC, by Marshall Hurley, and W. Wallace Respess, Jr., for plaintiff-appellee.

Arnold & Smith, PLLC, by Matthew R. Arnold and Ashley A. Crowder, for defendant-appellant.

BRYANT, Judge.

Because defendant's appeal of a trial court order is interlocutory and where defendant fails to establish a substantial right is detrimentally affected absent our review, we dismiss this appeal.

On 2 March 2018, plaintiff Jonathan Drew Estes filed a complaint against defendant John J. Battiston, Jr., alleging that defendant intentionally sabotaged the relationship between plaintiff and his wife and seeking recovery on the basis of alienation of affection, criminal conversation, and punitive damages. On 15 May 2018, defendant filed an answer and multiple motions. The motions included several motions to dismiss, the first of which alleged that plaintiff's claims were "facially unconstitutional[.]" Defendant moved to have the determination of that motion, concerning the constitutionality of plaintiff's claims, referred to a three-judge panel for consideration.

On 6 May 2019, the trial court entered an order on defendant's motion to refer the matter to a three-judge panel. The trial court noted defendant's reliance on N.C. Gen. Stat. § 1-267.1 and held that the statute "does not apply to common law torts." Accordingly, the trial court denied defendant's motion to refer the matter to a three-judge panel.

From the order denying his motion to refer the matter to a three-judge panel, defendant appeals.

In his sole argument on appeal, defendant contends that the trial court erred in denying his motion to refer the case to a three-judge panel for consideration of the constitutionality of the claims against him. We dismiss this appeal as interlocutory.

Interlocutory Appeal

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Veazey v. Durham, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381 (1950) (citations omitted).

> [I]mmediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final

> judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a substantial right.

Sharpe v. Worland, 351 N.C. 159, 161–62, 522 S.E.2d 577, 579 (1999) (citations and quotation marks omitted).

In the instant case, the trial court did not certify the order for appeal. Thus, defendant must show a substantial right has been affected in order to proceed on his interlocutory appeal.

> [A]n interlocutory order affects a substantial right if the order deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered. Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment.

Id. at 162, 522 S.E.2d at 579 (alterations in original) (citation and quotations marks omitted).

Defendant acknowledges his appeal is interlocutory. In support of his contention that a substantial right has been affected, defendant offers two arguments: first, that a three-judge panel has exclusive jurisdiction to hear constitutional challenges; and second, that defendant has a right to avoid duplicative trials.

Regarding his first substantial right argument, defendant cites N.C. Gen. Stat. § 1-267.1, which provides that "any facial challenge to the validity of an act of the General Assembly shall be transferred . . . to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County[.]" N.C. Gen. Stat. § 1-267.1(a1) (2019). Notably, however, defendant's argument fails to take into account key language of that statutory provision. The statute, by its language, applies to "an act of the General Assembly[.]" *Id.* As the trial court held, plaintiff's claims did not arise under acts of the General Assembly – alienation of affection and criminal conversation are torts arising under common law. Defendant offers no cogent explanation as to why this statute, whose clear and unambiguous language applies only to legislative acts, should apply to common law torts, nor does he offer any relevant citation of statutory or case law which might support such a position. Therefore, defendant has not shown that exclusive jurisdiction is vested in a three-judge panel.

With regard to his second substantial right argument, defendant asserts that because a three-judge panel has exclusive jurisdiction, failing to grant his motion would result in duplicative litigation. As we have held, however, the statute upon which defendant relies does not vest exclusive jurisdiction in a three-judge panel, where, as here, it concerns acts of the legislature, not common law torts. Accordingly, we hold that defendant has not shown a risk of duplicative litigation.

Because defendant has failed to demonstrate that the deprivation of a substantial right would potentially work injury to him if not corrected before an appeal from a final judgment, we dismiss his appeal as interlocutory. *See Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579.

Cursory Review

In the event this panel did reach the merits of defendant's argument, we would likely affirm the trial court.

"Alleged violation of a statutory mandate presents a question of law, which we review *de novo* on appeal." *Dion v. Batten*, 248 N.C. App. 476, 488, 790 S.E.2d 844, 852 (2016).

Defendant contends all common law torts were brought under the purview of the General Assembly via N.C. Gen. Stat. § 4-1. This statute provides that "[a]ll such parts of the common law as were heretofore in force and use within this State, . . . are hereby declared to be in full force within this State." N.C. Gen. Stat. § 4-1 (2019). Defendant contends the trial court failed to acknowledge that this renders common law torts subject to N.C. Gen. Stat. § 1-267.1.

While N.C. Gen. Stat. § 4-1 codified common law torts, those torts themselves, insofar as they were not subsequently altered or updated by legislative action, were not the result of legislative action such that N.C. Gen. Stat. § 1-267.1 would apply. Nor does such a ruling deprive defendant of a remedy: a party may nonetheless challenge the facial constitutionality of a common law tort before a trial court via a Rule 12(b)(6) motion. *See Malecek v. Williams*, 255 N.C. App. 300, 804 S.E.2d 592 (2017) (reversing an order which dismissed claims for torts of alienation of affection and criminal conversation as facially unconstitutional).

Finally, even assuming *arguendo* that the trial court erred in denying the motion on the basis that N.C. Gen. Stat. § 1-267.1 did not apply, such error is harmless. Defendant's motion alleged no specific basis, only the facial unconstitutionality of the torts. And as this Court held in *Malacek*, those torts are not facially unconstitutional. A three-judge panel would

have been bound by the precedent of this Court and ruled accordingly. As a matter of law, then, defendant cannot show that he was in any way prejudiced by the trial court's denial.

For these reasons, had we reached the merits of defendant's appeal, we would likely affirm the trial court's denial of defendant's motion to refer the constitutionality of the torts at issue to a three-judge panel. However, having determined defendant's appeal to be interlocutory and not affecting a substantial right, we dismiss this appeal.

DISMISSED.

Judges INMAN and ARROWOOD concur.

IN THE MATTERS OF N.K. AND D.K.

No. COA19-1027

Filed 20 October 2020

1. Child Abuse, Dependency, and Neglect—adjudication—abuse and neglect—sufficiency of evidence

The trial court properly adjudicated respondent-mother's son as abused where clear and convincing evidence supported its findings that respondent-mother took and distributed pornographic photos of the child and tried to frame her brother for it. Additionally, the trial court properly adjudicated both of respondent-mother's children as neglected where her abuse of the one child established that both children lived in an environment injurious to their welfare (N.C.G.S. § 7B-101(15)).

2. Child Abuse, Dependency, and Neglect—dispositional order—visitation—improper delegation of judicial authority to third parties

In an abuse and neglect case, the visitation provisions of a dispositional order were vacated and remanded where, by forbidding respondent-mother to have any contact with her children until agreed upon by her therapist and the children's therapists, the trial court seemingly—and improperly—delegated its authority to allow and set the terms for visitation to third parties.

3. Child Abuse, Dependency, and Neglect—adjudication—abuse and neglect—findings of fact—sufficiency of evidence

The trial court properly adjudicated the parties' children as abused and neglected where clear and convincing evidence supported its finding that respondent-father knew about respondent-mother's criminal charges (she took and distributed pornographic photos of one of the children and, at one point, burned down the family home) but did nothing to protect the children. Whether respondent-father believed in respondent-mother's guilt was irrelevant.

4. Child Abuse, Dependency, and Neglect—dispositional order—placement with a relative—statutory requirements

In an abuse and neglect case, the trial court did not abuse its discretion by declining to place the parties' children with a relative where, although respondent-father presented his half-sister and the children's great aunt as potential placements, the evidence showed that neither woman was able to provide "proper care and supervision" or a "safe home" (N.C.G.S. § 7B-903(a1)). Because the court found no relative who met the statutory requirements under section 7B-903(a1), the court was not required to make findings of fact about whether placement with a relative would be in the children's best interests.

5. Child Abuse, Dependency, and Neglect—dispositional order—visitation—right to file motion for review

In an abuse and neglect case, the trial court erred when it failed to advise and give notice to respondent-father of his right to file a motion for review of the visitation plan set forth in the court's dispositional order.

6. Child Abuse, Dependency, and Neglect—dispositional order—custody remaining with department of social services—best interests of the children

In an abuse and neglect case, the trial court did not abuse its discretion by ordering that the children remain in the department of social services' custody rather than placing them together in a home with relatives and frequent access to respondent-father, where the court's unchallenged findings of fact showed that it properly considered the children's best interests while evaluating all available placement options.

Appeal by respondent-mother and respondent-father from order entered 12 August 2019 by Judge Sarah C. Seaton in District Court, Onslow County. Heard in the Court of Appeals 25 August 2020.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Jackson W. Moore, Jr., for guardian ad litem.

Patrick S. Lineberry, for respondent-mother.

Steven S. Nelson, for respondent-father.

STROUD, Judge.

Respondent-parents appeal a juvenile adjudication and disposition order for their two children. We affirm the adjudication order and vacate in part the disposition and remand only the provisions regarding visitation. As to respondent-mother, the district court may not leave visitation in the discretion of third parties; as to respondent-father, the court must clarify his right to file a motion to review.

I. Background

On 7 November 2018, the Onslow County Department of Social Services ("DSS") filed a juvenile petition alleging Norm[1] was an abused and neglected juvenile and Doug was a neglected juvenile. The petition alleged respondent-mother burned down the family home and took and distributed pornographic photos of Norm; as to respondent-father, the petition alleged he had full knowledge of respondent-mother's criminal behavior but had been unwilling to protect the children. After hearings on 13 and 17 May 2019, on 12 August 2019, the district court entered an order with extensive findings of fact and ultimately adjudicated Norm as abused and both children as neglected. The court ordered that respondent-mother was not allowed to have any contact with the children until agreed upon by her and the children's therapists; respondent-father's visitation was supervised. Both respondent-mother and respondent-father appeal.

II. Respondent-Mother

Respondent-mother makes three arguments on appeal.

A. Sufficiency of Evidence to Support Findings

[1] Respondent-mother first contends "the trial court's order relies on a vacuum of evidence for adjudicating . . . [the children] as neglected and [Norm] as abused[.]" (Original in all caps.)

1. Pseudonyms are used throughout the opinion.

> We review an adjudication under N.C. Gen. Stat. § 7B-807 to determine whether the trial court's findings of fact are supported by clear and convincing competent evidence and whether the court's findings support its conclusions of law. The clear and convincing standard is greater than the preponderance of the evidence standard required in most civil cases. Clear and convincing evidence is evidence which should fully convince. Whether a child is dependent is a conclusion of law, and we review a trial court's conclusions of law de novo.

In re M.H., 272 N.C. App. 283, 286, ___ S.E.2d ___, ___ (July 7, 2020) (No. COA19-1132) (citations and quotation marks omitted).

Mother argues most of the substantive findings of fact regarding her abuse of Norm are not supported by the evidence. But respondent-mother does not challenge finding of fact 2(j) determining that

> [o]n or about August 31, 2018, the respondent mother was arrested for several charges relating to her taking pornographic pictures of the juvenile . . . [Norm] and distributing them, under the guise of their production and distribution by her brother, who resides in Alamance County. The respondent mother took the photographs to the Jacksonville Police Department, alleging that they were taken by her brother, and the law enforcement investigation revealed that they had in fact been taken and distributed by her.

Evidence of the creation, dissemination, or maintenance of pornographic photos of a child is evidence of abuse. *See* N.C. Gen. Stat. § 7B-101(1)(d) (2017) (defining an "[a]bused juvenile[]" in part as "preparation of obscene photographs, slides, or motion pictures of the juvenile, as provided in G.S. 14-190.5; employing or permitting the juvenile to assist in a violation of the obscenity laws as provided in G.S. 14-190.6; dissemination of obscene material to the juvenile as provided in G.S. 14-190.7 and G.S. 14-190.8; displaying or disseminating material harmful to the juvenile as provided in G.S. 14-190.14 and G.S. 14-190.15; first and second degree sexual exploitation of the juvenile as provided in G.S. 14-190.16 and G.S. 14-190.17[.]").[2]

---

2. There have been several versions of North Carolina General Statute § 7B-101 between 2017-2019 but all have classified creating, disseminating, or otherwise maintaining pornographic photos of a child as abuse of that child. *See generally* N.C. Gen. Stat. § 7B-101(1)(3) (2017-2019).

Respondent-mother's argument that there was no substantive evidence to support the findings of her abuse of Norm is not supported by the record. Detective Daniel Karratti of the Jacksonville Police Department extensively testified regarding the investigation which led to respondent-mother's criminal charges that form the basis for the adjudication of Norm as an abused child. We will not discuss Detective Karratti's testimony in detail here or the crimes and related file numbers under which respondent-mother was criminally charged. The question in this case is not whether respondent-mother is guilty of the alleged crimes; we are only considering whether the district court findings are supported by clear and convincing evidence. *See M.H.*, 272 N.C. App. at ___, ___ S.E.2d at ___.

The evidence shows respondent-mother admitted to the detective that she had sent a pornographic photo of Norm to her aunt.[3] Respondent-mother claimed her brother had taken the photographs, although Detective Karratti determined respondent-mother had taken them. In any event, even if respondent-mother's brother took the photographs, respondent-mother admitted she disseminated them, regardless of her purpose for the distribution.

The evidence thus supported the district court's finding of fact

> that the respondent mother's cell phone had a number of pictures of the juvenile . . . [Norm] unclothed and in seductive poses, which the respondent mother disseminated to a number of people as an elaborate hoax to indicate that her brother had taken and sent the pictures, when in fact the pictures were taken and sent by her. The respondent father should have been aware that the respondent mother put their child in substantial harm by taking and disseminating these pictures. The Court further finds that these pictures are now released into an electronic space where they may be disseminated again, causing significant harm to the juvenile [Norm] now, and in the future.

Detective Karratti's testimony was "clear, and convincing competent evidence[,]" *see In re M.H.*, 272 N.C. App. at 286, ___ S.E.2d at ___,

---

3. Upon further questioning respondent-mother recanted her statement but her admission coupled with the photos on her phone are evidence that Norm was an abused juvenile. *See generally* N.C. Gen. Stat. § 7B-101(1)(d). The trial court determines the credibility and weight of that evidence. *See generally Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994) ("We note that it is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial.").

supporting the district court's findings. The evidence supports the district court's findings that respondent-mother had knowingly distributed a pornographic photo of Norm, and this finding is sufficient to support the district court's adjudication of abuse. *See generally* N.C. Gen. Stat. § 7B-101(d)(1).

A neglected juvenile is defined in part as a child who lives in an environment injurious to his welfare. *See* N.C. Gen. Stat. § 7B-101(15) (2017). The proper adjudication of the recent and disturbing abuse of Norm while Doug was in the same environment is clear and convincing competent evidence of the neglect of Doug. *See In re C.M.*, 198 N.C. App. 53, 65–66, 678 S.E.2d 794, 801 (2009) ("Since the statutory definition of a neglected child includes living with a person who has abused or neglected other children, and since this Court has held that the weight to be given that factor is a question for the trial court, the trial court, in this case, was permitted, although not required, to conclude that Tess was neglected based on evidence that respondent-father had abused Alexander. *See, e.g.*, *In re A.S.*, 190 N.C. App. 679, 691, 661 S.E.2d 313, 321 (2008) (affirming the trial court's adjudication of neglect of one child based on evidence that respondent had abused another child by intentionally burning her), *affirmed per curiam*, 363 N.C. 254, 675 S.E.2d 361 (2009); *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005) (affirming adjudication of neglect of one child based on prior adjudication of neglect with respect to other children and lack of accepting responsibility). *With this Court's determination supra that Alexander was properly adjudicated abused, any weight given by the trial court to the abuse adjudication in determining Tess's neglect was proper*." (emphasis added)). Further, the evidence establishing Norm's abuse is enough to substantiate that he lived in an environment injurious to his welfare, *see* N.C. Gen. Stat. § 7B-101(15) (2017), and thus was also a neglected juvenile. The district court properly adjudicated Norm as abused and both children as neglected. This argument is overruled.

B. Visitation

[2] The district court's order does not allow respondent-mother to have any contact with the children "until agreed upon and recommended by both the children's therapists and therapist of [respondent-mother] only after court recommendations for her bond conditions or probation terms change." Respondent-mother next contends "the trial court erred in denying [respondent-mother] visitation with . . . [the children] and otherwise leaving visitation in the discretion of the therapists." (Original in all caps.) The *guardian ad litem* has requested we vacate and remand the order as to respondent-mother's visitation for "greater clarity" as

one potential reading of the order "would be to delegate the visitation authority to certain therapists without court intervention."

"We review a dispositional order only for abuse of discretion. An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Matter of S.G.*, 268 N.C. App. 360, 368, 835 S.E.2d 479, 486 (2019) (citation, quotation marks, and brackets omitted).

North Carolina General Statute §7B-905.1(a) addresses the requirements for court orders regarding visitation with a child who has been removed from the home:

> An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety. The court may specify in the order conditions under which visitation may be suspended.

N.C. Gen. Stat. §7B-905.1 (2017).[4]

Although the district court may deny a parent visitation with a child if it determines visitation is not in the child's best interest, *see id.*, the court must make appropriate findings to support an order denying visitation. *See generally Matter of T.W.*, 250 N.C. App. 68, 77, 796 S.E.2d 792, 798 (2016) ("The order must establish an adequate visitation plan for the parent in the absence of findings that the parent has forfeited their right to visitation or that it is in the child's best interest to deny visitation." (citation, quotation marks, and brackets omitted)). If the district court orders visitation, the court "shall specify the minimum frequency and length of the visits and whether the visits shall be supervised." N.C. Gen. Stat. §7B-905.1(d).

This Court has previously determined that a lower court may not delegate its authority to set visitation to the custodian of the child: "[W]hen visitation rights are awarded, it is the exercise of a judicial function." *See generally In re Custody of Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971) ("We do not think that the exercise of this judicial function may be properly delegated by the court to the custodian of the child. Usually those who are involved in a controversy over the custody

4. North Carolina General Statute § 7B-905.1 was amended effective 1 October 2019 and will guide the district court upon remand. *See* N.C. Gen. Stat. §7B-905.1 (2019).

of a child have been unable to come to a satisfactory mutual agreement concerning custody and visitation rights. To give the custodian of the child authority to decide when, where and under what circumstances a parent may visit his or her child could result in a complete denial of the right and in any event would be delegating a judicial function to the custodian."). Here, the district court neither completely denied visitation nor set out terms for visitation but instead delegated both the authority to allow visitation and the terms of that visitation to three therapists who worked with respondent-mother and each child.

While there is more than one way to interpret the court's order regarding respondent-mother's visitation, we agree the order seems to delegate the decision to allow visitation, as well as the conditions and schedule of visitation, to three therapists, as it was to be "agreed upon" by the children's therapists and respondent-mother's therapist. Under the terms of the order, if one of the three therapists fails to agree, no visitation would occur. We vacate and remand the visitation portion of the order as it applies to respondent-mother for the district court to exercise its own discretion regarding visitation and to enter an order with provisions as required by North Carolina General Statute § 7B-905.1.

C. Relative Placement

Lastly, respondent-mother incorporates respondent-father's first argument on appeal regarding relative placement. As the substance of the argument is in respondent-father's brief, we will address it in the portion of the opinion regarding his appeal.

D. Summary

In summary, the district court properly adjudicated Norm as abused and the children as neglected, but we vacate the portion of the order regarding respondent-mother's visitation and remand entry of an order addressing visitation in accord with North Carolina General Statute §7B-905.1.

III. Respondent-Father

Respondent-father makes five arguments on appeal. We will address respondent-father's arguments regarding the adjudication first.

A. Sufficiency of Evidence to Support Findings for Adjudication

[3] Like respondent-mother, respondent-father also contends "the trial court[']s order relies on a vacuum of evidence for adjudicating [Doug] and [Norm] as neglected and [Norm] as abused[,]" (original in all caps), and the entirety of this portion of his argument is the incorporation of

respondent-mother's argument. We have already addressed this argument and overrule it.

Respondent-father raises an additional argument regarding the sufficiency of the evidence to support the trial court's findings regarding his knowledge of Respondent-mother's actions. Respondent-father contends "the trial court erred when it found during the children's adjudication, that [respondent-father] had prior knowledge of [respondent-mother's] prior criminal behavior and knowledge of her current criminal behavior and that he failed to protect his children from their abuse and neglect. Respondent-father testified about respondent-mother's criminal behavior. In his brief, he contends that he "knew" what respondent-mother was *accused* of but he did not "know" she actually did these things. We need not list the findings of fact regarding respondent-father's knowledge, as he does not challenge the findings as unsupported by the evidence. Regardless of respondent-father's beliefs about respondent-mother's actions, the record supports the district court's determination that respondent-father was aware of respondent-mother's criminal charges *and* the actions which led to the charges, and we read the findings of fact as addressing his awareness of respondent-mother's actions and not whether he knew or believed she was guilty of a particular crime. This argument is without merit.

B. Relative Placement

[4] Respondent-father first contends "the trial court erred and abused its discretion when it failed to place the children with family members and failed to comply with the statutory mandates contained in N.C. Gen. Stat. §§ 7B-903(a1) (2015) and 7B-506(h)(2) (2017)." (Original in all caps.) We first note that North Carolina General Statute § 7B-506 (2017) is entitled "Hearing to determine need for continued nonsecure custody[.]" None of the orders for continued nonsecure custody are at issue on appeal, and therefore we address only respondent-father's argument as to relative placement under North Carolina General Statute § 7B-903. We review statutory compliance *de novo*. *See generally In re M.S.*, 247 N.C. App. 89, 91, 785 S.E.2d 590, 592 (2016) ("We consider matters of statutory interpretation *de novo*." (citation omitted)).

As to North Carolina General Statute § 7B-903(a1), respondent-father argues that the court did not make findings of fact regarding why the best interests of the children would not be served by placing them with relatives, as he contends is required by the statute. North Carolina General Statute § 7B-903(a1) provides,

> In placing a juvenile in out-of-home care under this section, the court shall first consider whether a relative

> of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile. In placing a juvenile in out-of-home care under this section, the court shall also consider whether it is in the juvenile's best interest to remain in the juvenile's community of residence. Placement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children.

N.C. Gen. Stat. § 7B-903 (2019). Thus, the district court must first consider whether a "relative is willing and able to provide proper care and supervision in a safe home[.]" *Id.* If so, "*then* the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile." *Id.*

Respondent-father argues placement with a relative would be in the best interest of the children, but he ignores the first portion of the statute. The district court must first determine there is a relative who is willing to care for the children and "able to provide proper care and supervision in a safe home[.]" *Id.* Here, the court found there was no relative available who met these statutory requirements, so there was no need to consider whether placement with a relative would be in the children's best interests.

Father contends there were two relatives available to care for the children: a maternal great aunt, Ms. Smith, and the children's paternal half-sister, Ms. Adams.[5] As to Ms. Smith, DSS had reported that her placement was not suitable: "Home Study for . . . [the Smiths] w[as] denied." The DSS report was admitted as evidence at the disposition hearing. Further, a prior continuation of nonsecure custody order from March of 2019 had found "the [Smiths] had their home assessment denied by Alamance County." Neither respondent challenged the DSS report, the nonsecure custody order finding, or presented any evidence indicating Ms. Smith was available and able to care for the children.

---

5. We have used pseudonyms for these relatives to protect the identity of the juveniles.

As to Ms. Adams, the district court found that

> [t]he juveniles were removed from the home of their paternal sister . . . [Ms. Adams] after a hearing on March 25, 2019 when the Court found that [Ms. Adams] was allowing the juveniles to sleep overnight at the home of their paternal grandmother, who has prior child protective services history and is not an appropriate caregiver to these juveniles[;]

Respondent-father does not challenge this finding of fact but contends it is not sufficient to establish that Ms. Adams was not "willing and able to provide proper care and supervision of the juvenile in a safe home." Yet all of the evidence before the court showed that neither Ms. Smith nor Ms. Adams were able to provide "proper care and supervision" or a "safe home." *Id.* Respondent-father presented no evidence to counter DSS's evidence or the home studies of the relatives. There was no need for the district court to make findings of fact as to why it was not in the children's best interests to be placed with Ms. Smith and Ms. Adams since neither was able to provide a safe and appropriate home.

Based upon the evidence and binding finding of fact, *see In re C.B.*, 245 N.C. App. 197, 199, 783 S.E.2d 206, 208 (2016) ("Unchallenged findings are binding on appeal."), there was not an appropriate relative placement available for the children. The court *only* engages in a best interests analysis as to relative placement, after "*first* consider[ing] whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home" and upon determining "the relative *is* willing and able to provide proper care and supervision in a safe home[.]" *Id.* (emphasis added). Here, the uncontroverted evidence and findings in this and a prior order establish Ms. Smith and Ms. Adams were not "able to provide proper care and supervision of the juvenile in a safe home[,]" and thus the court did not need to take the next step of considering the children's best interests. *Id.* The district court complied with North Carolina General Statute § 7B-903(a1).[6] Further, the court did not abuse its discretion regarding its disposition of non-relative placement. *See S.G.*, 268 N.C. App. at ___, 835 S.E.2d at 486. This argument is overruled.

---

6. Respondent-father also contends it is in the best interests of the children to be in placement together, and this would be accomplished by the children staying with relatives, but again, such an analysis specifically under North Carolina General Statute § 7B-903(a1) as is at issue on appeal, is only required *after* a determination that relative placement is possible and appropriate. *See generally* N.C. Gen. Stat. § 7B-903(a1).

C. Motion for Review

[5] Respondent next contends "the trial court erred when it failed to advise and give notice to [respondent-father] of his right to file a motion for review of the visitation plan." (Original in all caps.) As with the provisions regarding respondent-mother's visitation, the *guardian ad litem* also requests this Court vacate the provisions of the order regarding visitation and remand for explicit compliance with North Carolina General Statute § 7B-905.1(d). As we are already remanding the visitation provision regarding respondent-mother and as the *guardian ad litem* requests the same remedy as respondent-father, we also remand the rest of the visitation provision as all parties have contended the entirety of the visitation determinations made by the court lacked clarity regarding who had discretion over visitation and a right to review. *See, e.g.*, *Matter of J.L.*, 264 N.C. App. 408, 422-23, 826 S.E.2d 258, 268-69 (2019) (vacating and remanding for compliance with N.C. Gen. Stat. § 7B-905.1(d)).

D. Best Interests

[6] Respondent-father next contends "the trial court erred when it failed to comply with the statutory mandates required to satisfy the children's best interests in the initial disposition." (Original in all caps.) The only statute cited and quoted by respondent-father is a federal one regarding "reasonable efforts" to place siblings together. For the remainder of the argument, respondent-father essentially reasserts his points regarding relative placement and rather than challenging any findings of fact contends that the district court was simply wrong about what was in the children's best interests.

Respondent-father contends "[t]he children's best interests require that they be kept together in a home with family and with frequent access to their father." As a general proposition, North Carolina's statutes recognize "family autonomy" as an ideal goal for all families. *See* N.C. Gen. Stat. § 7B-100 (2019).

> Some of the purposes of Chapter 7B, subchapter I are
>
> > (3) To provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence; and
> >
> > (4) To provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the

> unnecessary or inappropriate separation of juveniles from their parents.

Id.

Unfortunately, it is not always possible for children to be safe "in a home with family and with frequent access to their father." The district court properly considered the children's interests while evaluating the alternatives that were *actually* available to them. The court made many findings of fact which are not at issue on appeal supporting the court's adjudication and its determination that the children should remain in the custody of DSS. The court did not abuse its discretion in its extensive dispositional analysis regarding best interests. *See S.G.*, 268 N.C. App. at ___, 835 S.E.2d at 486. This argument is overruled.

E. Summary

In summary, we vacate and remand only regarding the visitation provisions for respondent-father and remand for the district court to enter a new order addressing visitation, including provisions regarding respondent-father's right to file a motion for review.

IV. Conclusion

We affirm the order as to adjudication and vacate in part the provisions regarding disposition, specifically as to visitation. On remand, the trial court shall enter a new order addressing respondent-mother's visitation and clarifying respondent-father's right to file a motion to review.

AFFIRMED in part; VACATED and REMANDED in part.

Judges DIETZ and ZACHARY concur.

BRADLEY E. PARKER, Plaintiff
v.
EMMA GRACE PFEFFER, Defendant

No. COA19-1151

Filed 20 October 2020

1. Civil Procedure—multiple Rule 12 motions to dismiss—priority given to personal jurisdiction issue

The trial court in a negligence action did not err by issuing an order granting defendant's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction before addressing defendant's Rule 12(b)(4) and 12(b)(5) motions to dismiss for insufficient process or service of process. Because of the fundamental nature of the personal jurisdiction issue, the court was free to review the Rule 12(b)(2) motion first, and, at any rate, the court concluded in its order that plaintiff properly served sufficient process on defendant.

2. Jurisdiction—personal—long-arm statute—substantial activity within the state

After a car accident in Texas involving a North Carolina resident (plaintiff) and a Texas resident (defendant), a North Carolina trial court properly dismissed plaintiff's negligence action for lack of personal jurisdiction where plaintiff failed to show under the state's long-arm statute that defendant "engaged in substantial activity" within North Carolina. Although defendant exchanged text messages with plaintiff about the car accident while plaintiff was in North Carolina, had taken six vacations to North Carolina in the past, and was planning to visit North Carolina in the future to attend her brother's wedding, none of these contacts satisfied the "substantial activity" requirement under the long-arm statute.

Appeal by plaintiff from judgment entered 7 August 2019 by Judge Christine M. Walczyk in Wake County District Court. Heard in the Court of Appeals 26 August 2020.

Williams Mullen, by Michael C. Lord, for plaintiff-appellant.

Teague Rotenstreich Stanaland Fox & Holt PLLC, by Camilla F. DeBoard and Kara V. Bordman, for defendant-appellee.

BERGER, Judge.

On August 7, 2019, the trial court granted Emma Grace Pfeffer's ("Defendant") motion to dismiss for lack of personal jurisdiction. Bradley E. Parker ("Plaintiff") appeals, arguing the trial court erred when it (1) failed to address Defendant's Rule 12(b)(4) and 12(b)(5) motions before issuing its order on Defendant's Rule 12(b)(2) motion; (2) determined that it lacked personal jurisdiction over Defendant; and (3) concluded that it did not maintain personal jurisdiction over Defendant when Defendant's contacts with North Carolina were continuous and systematic. We disagree.

Factual and Procedural Background

On April 19, 2018, Plaintiff and Defendant were in a two-car accident in Austin, Texas. In September 2018, Plaintiff filed an action for negligence in Wake County District Court, and Defendant filed a motion in lieu of answer seeking dismissal under North Carolina Rules of Civil Procedure 12(b)(2), (4), (5), and (6). On October 31, 2018, Defendant filed an amended motion in lieu of answer and an affidavit executed by Defendant. The affidavit asserted that Defendant is a citizen of the State of Texas, and did not operate a business, possess property, maintain financial accounts, or regularly visit North Carolina.

On January 8, 2019, the trial court denied Defendant's motion in lieu of answer "because, absent any service of process, the [trial court did] not have subject matter jurisdiction[,]" but "[o]nce the Complaint is served, Defendant [was] not barred from asserting any Rule 12 defense she may have." On February 22, 2019, Plaintiff filed an unverified amended complaint accompanied by a certificate and affidavit of service. Defendant responded with a second motion in lieu of answer and an appended affidavit contesting personal jurisdiction.

On July 18, 2019, this matter came on for hearing. In granting Defendant's 12(b)(2) motion, the trial court made the following undisputed findings of fact:

> 1. On or about April 19, 2018, Defendant and Plaintiff were involved in a motor vehicle accident (the "Accident") that occurred at the intersection of East 7th Street and North Interstate 35 Frontage Road located in Austin, Travis County, Texas.
>
> 2. Plaintiff resides in North Carolina.
>
> 3. Defendant resides in Texas.
>
> 4. Defendant does not operate any business or conduct any business in the State of North Carolina.

5. Defendant founded a charity that performs annual bike rides. Defendant solicits donations for this charity online and through social media. Residents of North Carolina are not excluded from these solicitations.

6. Defendant does not maintain any financial accounts including bank accounts in the State of North Carolina.

7. Defendant does not own or lease any real property in the State of North Carolina.

8. Defendant visited the state of North Carolina on six occasions prior to the accident on April 19, 2018, that is the basis for the allegations in the Complaint. Her only intention to return to the state of North Carolina is for her brother's wedding in October of 2019.

9. Defendant has no current intention to engage in business in North Carolina, drive through the state of North Carolina, or use the roads of North Carolina other than for her vacation in October of 2019 for her brother's wedding.

10. Defendant has not shipped anything to Plaintiff in North Carolina.

11. Defendant exchanged twelve (12) text messages with Plaintiff between May 1, 2018 and June 29, 2018 and she spoke to him once on the telephone after Plaintiff returned to North Carolina. Plaintiff initiated the text message conversation and the content of the messages concerned the accident.

Based upon these findings of fact, the trial court concluded:

1. The Court relies on the two affidavits of Defendant and pleadings contained in the Court file in support of its decision below;

2. Plaintiff filed a Complaint on or about September 4, 2018, requesting compensatory damages arising out of a motor vehicle accident that occurred on or about April 19, 2018 in Austin, Harris County, Texas, and Plaintiff filed an amended complaint on February 22, 2019;

3. Defendant first filed a motion to dismiss pursuant to Rule 12(b)(2), (4), (5) and (6) of the North Carolina Rules of Civil Procedure that was denied without prejudice by

the Honorable Michael Denning, to be refiled after service of the Complaint;

4. The contacts Defendant has had with the state of North Carolina are not such contacts Defendant would expect to be brought into court and subject to jurisdiction in North Carolina;

5. The accident upon which the Complaint is based has no connection to the limited prior or single planned future visitation of Defendant to the state of North Carolina;

6. The use of social media by the Defendant not specifically targeted at the state of North Carolina is not enough to establish jurisdiction or minimum contact[s] in North Carolina;

7. In review of the service in the Court file, the affidavit of service appears to have [been] properly served by Federal Express the Complaint;

8. In review of the Court file and service, the motion to dismiss for personal jurisdiction is ripe and ready for determination by the Court; and

9. The Plaintiff has not established general or specific jurisdiction over the Defendant with regard to those matters alleged in the Complaint and this Action.

The trial court denied Defendant's Rule 12(b)(4) and 12(b)(5) motions to dismiss and granted Defendant's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. On September 3, 2019, Plaintiff entered written notice of appeal. While this appeal was pending, Plaintiff filed a complaint in Travis County (Texas) District Court.

Standard of Review

"When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Banc of America Securities LLC v. Evergreen Intern. Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005) (citation and quotation marks omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *City of Asheville v. Aly*, 233 N.C. App. 620, 625, 757 S.E.2d 494, 499 (2014) (citation omitted).

Analysis

The trial court's order dismissing this action is a final judgment, and appeal therefore lies to this Court pursuant to N.C. Gen. Stat. § 7A-27(b).

I. Service of Process

[1] Plaintiff first argues that the trial court erred by failing to address Defendant's Rule 12(b)(4) and 12(b)(5) motions before issuing its order on Defendant's Rule 12(b)(2) motion. Because of personal jurisdiction's fundamental nature, our courts are not prohibited from reviewing a Rule 12(b)(2) motion prior to review of a Rule 12(b)(4) or 12(b)(5) motion, and Plaintiff's argument is without merit. *See Love v. Moore*, 305 N.C. 575, 579-80, 291 S.E.2d 141, 145 (1982) (holding that the court may consider Rule 12(b)(2) motions prior to Rule 12(b)(4) and 12(b)(5) motions); *see also Prof'l Vending Servs., Inc. v. Michael D. Sifen, Inc.*, No. COA08-1383, 2009 WL 2370683, at *5 (N.C. Ct. App. Aug. 4, 2009) (unpublished) ("Although some issues concerning the adequacy of service on certain of the [d]efendants are discussed in [d]efendants' brief, we do not believe that it is necessary for us to decide those service-related issues given our resolution of the fundamental personal jurisdiction issue[.]").

Regardless, conclusions of law 7 and 8 contain mixed findings of fact and conclusions of law. "The labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review." *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) (citation omitted). Specifically, "[w]hen this Court determines that findings of fact and conclusions of law have been mislabeled by the trial court, we may reclassify them, where necessary, before applying our standard of review." *Cox v. Cox*, 238 N.C. App. 22, 31, 768 S.E.2d 308, 314 (2014). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Johnson v. Johnson*, 259 N.C. App. 823, 831, 817 S.E.2d 466, 473 (2018) (citation and quotation marks omitted). Because Plaintiff does not specifically challenge conclusion of law 7 – "the affidavit of service appears to have [been] properly served by Federal Express the Complaint" and conclusion of law 8 – "the motion to dismiss for personal jurisdiction is ripe and ready for determination by the Court[,]" these mislabeled findings are binding on our Court. *See id.* at 831, 817 S.E.2d at 473 (concluding that the trial court's finding of fact was binding on appeal because it was uncontested). Therefore, Plaintiff sufficiently served Defendant to effectuate review of personal jurisdiction under N.C. Gen. Stat. § 1-75.4(1).

II. Personal Jurisdiction

When a defendant challenges personal jurisdiction pursuant to Rule 12(b)(2),

> a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits. . . . Of course, this procedure does not alleviate the plaintiff's ultimate burden of proving personal jurisdiction at an evidentiary hearing or at trial by a preponderance of the evidence.

Bruggeman v. Meditrust Acquisition Co., 138 N.C. App. 612, 615, 532 S.E.2d 215, 217 (2000) (citation omitted). When "the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Banc of Am. Sec.*, 169 N.C. App. at 694, 611 S.E.2d at 183 (*purgandum*). It is not for this Court to "reweigh the evidence presented to the trial court." *Don't Do it Empire, LLC v. Tenntex*, 246 N.C. App. 46, 57, 782 S.E.2d 903, 910 (2016).

When addressing the issue of personal jurisdiction on appeal, this Court "employs a two-step analysis." *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006). "First, jurisdiction over the action must be authorized by N.C.G.S. § 1-75.4, our state's long-arm statute." *Id.* at 119, 638 S.E.2d at 208 (citation omitted). "Second, if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Id.* at 119, 638 S.E.2d at 208.

A. Long-arm statute

[2] "[N.C. Gen. Stat. §] 1-75.4 is commonly referred to as the 'long-arm' statute." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977). Specifically, N.C. Gen. Stat. § 1-75.4 permits North Carolina courts to exercise personal jurisdiction when,

> the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
>
> a. Is a natural person present within this State; or
>
> b. Is a natural person domiciled within this State; or
>
> c. Is a domestic corporation; or
>
> d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

N.C. Gen. Stat. § 1-75.4(1) (2019). "[B]y its plain language[, N.C. Gen. Stat. § 1-75.4(1)] requires some sort of 'activity' to be conducted by the defendant within this state." *Skinner*, 361 N.C. at 119, 638 S.E.2d at 208. "The burden is on the plaintiff to establish itself within some ground for the exercise of personal jurisdiction over defendant." *Golds v. Cent. Express, Inc.*, 142 N.C. App. 664, 666, 544 S.E.2d 23, 26 (2001) (*purgandum*).

Here, the trial court reviewed Plaintiff's unverified amended complaint and Defendant's affidavit. Plaintiff alleges in his unverified amended complaint that the "Court has jurisdiction over [Defendant] due to, among other contacts, her communication with [Plaintiff] about the subject matter of this action while he was physically located in the State of North Carolina, and her visits to the State of North Carolina (including the most recent visit in 2017)." Plaintiff argues that "[t]he facts presented by the vehicular accident here fall within the circumstances outlined in . . . N.C. Gen. Stat. § 1-75.4(1)d." However, Plaintiff fails to specifically establish under N.C. Gen. Stat. § 1-75.4(1)(d), that Defendant "engaged in substantial activity within [North Carolina.]" N.C. Gen. Stat. § 1-75.4(1)(d).

Rather, Plaintiff alleged that North Carolina has jurisdiction over Defendant because she communicated with Plaintiff while he was in North Carolina. However, the trial court found that "Defendant exchanged twelve (12) text messages with Plaintiff between May 1, 2018 and June 29, 2018 and she spoke to him once on the telephone after Plaintiff returned to North Carolina. Plaintiff initiated the text message conversation and the content of the messages concerned the accident." These communications were limited to discussion about repair estimates and insurance claims which served to facilitate a potential out of court settlement without resorting to litigation.

The trial court's unchallenged findings of fact are binding on this Court. *See Wyatt v. Walt Disney World Co.*, 151 N.C. App. 158, 163, 565 S.E.2d 705, 709 (2002) ("[I]f the trial court's findings of fact resolving the defendant's jurisdictional challenge are not assigned as error, the court's findings are presumed to be correct" (citation and quotation marks omitted)). Therefore, Plaintiff has failed to demonstrate that Defendant's mere correspondence satisfies the "substantial activity" requirement of N.C. Gen. Stat. § 1-75(1)(d). *See Miller v. Szilagyi*, 221 N.C. App. 79, 92, 726 S.E.2d 873, 883 (2012) (finding no personal jurisdiction where defendant "made more than 100 telephone calls to [p]laintiff in North Carolina and that approximately 40 telephone calls and 25 emails were related to" the cause of action).

In addition, the trial court found and the record reveals that "Defendant visited the state of North Carolina on six occasions prior to the accident on April 19, 2018, that is the basis for the allegations in the Complaint[, and h]er only intention to return to the state of North Carolina is for her brother's wedding in October of 2019." Specifically, Defendant's second affidavit reveals that the prior six visits relate to family trips, visiting siblings at college, and visiting a friend from summer camp. *See Patrum v. Anderson*, 75 N.C. App. 165, 168, 330 S.E.2d 55, 57 (1985) (concluding there was no statutory basis for personal jurisdiction under N.C. Gen. Stat. § 1-75.4(1)(d) when "[t]he record shows that on six occasions defendant ordered souvenir caps or cars from plaintiff's company in North Carolina, that defendant occasionally came to North Carolina to watch auto races, and that he owned a racing team which entered cars in North Carolina races."). Accordingly, Plaintiff has failed to show that Defendant's few vacations to North Carolina, which have no relation to the traffic accident in Texas, constituted as "substantial activity" to satisfy the purpose of N.C. Gen. Stat. § 1-75.4(1)(d).

Because Plaintiff has failed to meet his burden of proving a statutory basis for personal jurisdiction, we need not conduct a due process inquiry because any "further inquiry will be fruitless." Gray, Wilson G. *North Carolina Civil Procedure* § 85-1. *See also Skinner*, 361 N.C. at 119, 638 S.E.2d at 208-09 (ceasing personal jurisdiction analysis after review of "N.C.G.S. § 1-75.4(1)(d)'s very broad terms, the facts of this case fail to invoke jurisdiction.").

Conclusion

For the foregoing reasons, the trial court did not err when it granted Defendant's Rule 12(b)(2) motion to dismiss.

AFFIRMED.

Judges INMAN and COLLINS concur.

STAHL v. BOWDEN

[274 N.C. App. 26 (2020)]

JULIE ANN STAHL, Individually, and Julie Ann Stahl as Administratrix for the Estate of Kenneth Newton Stahl, Plaintiffs
v.
DANIEL BOWDEN, (In His Individual Capacity), Defendant

No. COA20-111

Filed 20 October 2020

Immunity—911 dispatcher—plain language of statute—interlocutory appeal

In an action arising from a 911 dispatcher's (defendant's) failure to notify the N.C. Department of Transportation of a downed stop sign, resulting in a fatal car accident, defendant's appeal of the trial court's denial of his motion for summary judgment was dismissed as interlocutory where defendant could not establish that the order affected a substantial right entitling him to immediate appeal because the plain language of N.C.G.S. § 143B-1413 did not provide defendant statutory immunity (rather, it simply provided a heightened burden of proof).

Appeal by defendant from order entered 7 October 2019 by Judge Andrew T. Heath in Pender County Superior Court. Heard in the Court of Appeals 25 August 2020.

Baker Law Firm, PLLC, by H. Mitchell Baker, III, and Collins Law Firm, by David B. Collins, Jr., for plaintiffs-appellees.

Womble Bond Dickinson (US) LLP, by Christopher J. Geis, for defendant-appellant.

ZACHARY, Judge.

Defendant Daniel Bowden appeals from an order denying his motion for summary judgment. After careful review, we dismiss his appeal as interlocutory.

Background

Defendant was employed as a dispatcher in the Pender County 911 Communications Center, which is operated by the Pender County Sheriff's Office.

On 7 February 2017, Defendant fielded a call from a person reporting a downed stop sign at the intersection of Malpass Corner Road and

U.S. Highway 421. The eastbound intersection of Malpass Corner Road and U.S. Highway 421 had two stop signs: one sign, mounted on the right shoulder of the road, and a supplemental sign, mounted on a concrete median.

The caller told Defendant, "[T]hat's a dangerous intersection for there not to be a Stop Sign up." Defendant replied: "Yes ma'am, it is." He confirmed the location of the downed sign, and then told the caller, "[w]e will definitely let DOT know." No record exists of any communication from Defendant to the North Carolina Department of Transportation ("DOT") regarding that report.

On 10 February 2017, Plaintiffs were traveling from Florida to visit family in Newport, North Carolina. Julie Stahl was driving, with her husband Kenneth riding in the front passenger seat. Plaintiffs were heading east on Malpass Corner Road when they approached Highway 421; Julie did not stop, and Plaintiffs entered the intersection traveling at approximately 40 miles per hour. The stop sign mounted on the median was down.

Plaintiffs' vehicle collided with a tractor trailer heading north on U.S. Highway 421, overturned, and came to rest in a ditch on the northbound side of U.S. Highway 421. Julie suffered serious injuries, and Kenneth died from the injuries he suffered in the collision.

The next day, on 11 February 2017, the caller who had initially reported the downed stop sign called the Pender County 911 Communications Center again. This time, the caller did not speak with Defendant; a different dispatcher fielded the call. After reporting that the stop sign was still down, the caller added: "I called earlier this week and they still haven't come to put it back up and someone was killed at that intersection last night." The dispatcher emailed DOT, and DOT engineers righted the downed stop sign within two hours.

On 7 August 2018, Plaintiffs filed suit in New Hanover Superior Court against Defendant individually, alleging both negligence and gross negligence, and seeking damages resulting from the personal injuries to Julie and the wrongful death of Kenneth. On 4 September 2018, Defendant filed his answer and a motion, as of right, to transfer venue to Pender County Superior Court. Plaintiffs consented to Defendant's motion to transfer, and on 26 September 2018, the trial court entered a consent order transferring the case to Pender County Superior Court.

On 1 July 2019, Defendant filed his motion for summary judgment. Defendant argued, *inter alia*, that Plaintiffs' claims were barred by

statutory immunity. On 11 September 2019, Plaintiffs filed their response to Defendant's motion for summary judgment and moved for summary judgment in their favor.

The parties' competing motions for summary judgment came on for hearing on 16 September 2019, before the Honorable Andrew T. Heath. On 7 October 2019, the trial court entered its order denying both motions for summary judgment. Defendant timely appealed.

Interlocutory Jurisdiction

The denial of a motion for summary judgment is not a final judgment, but rather is interlocutory in nature. *See Cushman v. Cushman*, 244 N.C. App. 555, 559, 781 S.E.2d 499, 502 (2016). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, an interlocutory appeal "may be taken from [a] judicial order or determination of a judge of a superior or district court . . . which affects a substantial right claimed in any action or proceeding[.]" N.C. Gen. Stat. § 1-277(a) (2019); *see also id.* § 7A-27(b)(3)(a). "A substantial right is one affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a person is entitled to have preserved and protected by law: a material right." *Bowling v. Margaret R. Pardee Mem'l Hosp.*, 179 N.C. App. 815, 818, 635 S.E.2d 624, 627 (2006) (citation and internal quotation marks omitted), *disc. review denied*, 361 N.C. 425, 648 S.E.2d 206 (2007).

As a general rule, claims of immunity affect a substantial right, and therefore merit immediate appeal. *See Farrell v. Transylvania Cty. Bd. of Educ.*, 199 N.C. App. 173, 176, 682 S.E.2d 224, 227 (2009). Nonetheless, a party claiming the protection of statutory immunity must satisfy "all of the requirements" of the statute granting the claimed immunity in order to establish a substantial right entitling him to an immediate appeal. *Wallace v. Jarvis*, 119 N.C. App. 582, 585, 459 S.E.2d 44, 46, *disc. review denied*, 341 N.C. 657, 462 S.E.2d 527 (1995).

The parties assert that the case at bar is governed by N.C. Gen. Stat. § 143B-1413, which provides:

> (a) Except in cases of wanton or willful misconduct, a communications service provider, and a 911 system provider or next generation 911 system provider, and their employees, directors, officers, vendors, and agents are not liable for any damages in a civil action resulting from death or injury to any person or from

> damage to property incurred by any person in connection with developing, adopting, implementing, maintaining, or operating the 911 system or in complying with emergency-related information requests from State or local government officials. This section does not apply to actions arising out of the operation or ownership of a motor vehicle. The acts and omissions described in this section include, but are not limited to, the following:
>
> (1) The release of subscriber information related to emergency calls or emergency services.
>
> (2) The use or provision of 911 service, E911 service, or next generation 911 service.
>
> (3) Other matters related to 911 service, E911 service, or next generation 911 service.
>
> (4) Text-to-911 service.
>
> (b) In any civil action by a user of 911 services or next generation 911 services arising from an act or an omission by a PSAP, and the officers, directors, employees, vendors, agents, and authorizing government entity of the PSAP, in the performance of any lawful and prescribed actions pertaining to their assigned job duties as a telecommunicator. The plaintiff's burden of proof shall be by clear and convincing evidence.

N.C. Gen. Stat. § 143B-1413.

The parties agree that Defendant is an employee of "a 911 system provider," pursuant to Section 143B-1413(a). *Id*. However, upon careful review of Section 143B-1413, and the applicable statutory definitions contained in that chapter, we disagree.

We first note that the first portion of subsection (b) is a sentence fragment, and the period after "telecommunicator" appears to be an error. Subsection (b) was added by a 2015 amendment, which read:

> In any civil action by a user of 911 services or next generation 911 services arising from an act or an omission by a PSAP, and the officers, directors, employees, vendors, agents, and authorizing government entity of the PSAP, in the performance of any lawful and prescribed actions pertaining to their assigned job duties as a 911 or public

> safety telecommunicator or dispatcher at a PSAP or at any public safety agency to which 911 calls are transferred from a primary PSAP for dispatch of appropriate public safety agencies, the plaintiff's burden of proof shall be by clear and convincing evidence.

2015 N.C. Sess. Laws 1217, 1220, ch. 261, § 3.

This subsection was amended in 2019, when the phrase "911 or public safety telecommunicator or dispatcher at a PSAP or at any public safety agency to which 911 calls are transferred from a primary PSAP for dispatch of appropriate public safety agencies" was replaced by "telecommunicator." 2019 N.C. Sess. Laws ___, ___, ch. 200, § 7(j). The definition of "telecommunicator" was also adopted as part of the same session law. *Id.* § 7(a). The 2019 amendment included a period instead of a comma after "telecommunicator," thus creating the sentence fragment. But despite this error in punctuation, the meaning of the statute is clear.

For the purposes of this statute, a "911 system provider" is defined as "[a]n entity that provides an Enhanced 911 or NG911 system *to a PSAP*." N.C. Gen. Stat. § 143B-1400(5) (emphasis added). A PSAP—a "[p]ublic safety answering point"—is defined as "[t]he public safety agency that receives an incoming 911 call and dispatches appropriate public safety agencies to respond to the call." *Id.* § 143B-1400(25). A telecommunicator is a "person qualified to provide 911 call taking employed by a PSAP. The term applies to 911 call takers, dispatchers, radio operators, data terminal operators, or any combination of such call taking functions in a PSAP." *Id.* § 143B-1400(28a). By the plain language of these statutory definitions, Defendant—as a 911 telecommunicator—is "employed by a PSAP," rather than a 911 system provider.

Section 143B-1413(b) also does not provide statutory immunity to PSAPs or their employees. Subsection (b) provides, in pertinent part, that "[i]n any civil action by a user of 911 services . . . arising from an act or an omission by a PSAP" and its employees "pertaining to their assigned job duties as a telecommunicator[, t]he plaintiff's burden of proof shall be by clear and convincing evidence." *Id.* § 143B-1413(b). This does not grant employees of PSAPs, such as Defendant, any statutory immunity; instead, it provides a heightened burden of proof that any prospective plaintiff must meet in a suit against an employee of a PSAP under Section 143B-1413(b).

Simply put, the statutory immunity that Defendant claims is unavailable to 911 telecommunicators under the plain language of Section

143B-1413. Where a statute's "language is clear and unambiguous, . . . we are not at liberty to divine a different meaning through other methods of judicial construction." *Haarhuis v. Cheek*, 261 N.C. App. 358, 366, 820 S.E.2d 844, 851 (2018) (citation and internal quotation marks omitted), *disc. review denied*, 372 N.C. 298, 826 S.E.2d 698 (2019). This Court must apply the law as enacted by the legislature. Thus, if the statutory immunity that Defendant seeks is to be provided under our laws, it is not for this Court to provide it. *See id.* Such is the province of the General Assembly, and we defer to its judgment.

Conclusion

Defendant is unable to satisfy "all of the requirements" of Section 143B-1413 to obtain statutory immunity. *Wallace*, 119 N.C. App. at 585, 459 S.E.2d at 46. We are therefore unable to conclude that Defendant has established that the trial court's denial of his motion for summary judgment affected a substantial right entitling him to an immediate appeal. Accordingly, we dismiss Defendant's appeal as interlocutory.

DISMISSED.

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER ISSAC ALEXANDER, Defendant

No. COA19-847

Filed 20 October 2020

1. Appeal and Error—preservation of issues—Batson challenge —evidence of prospective juror's race—sufficiency of record

The record was minimally sufficient to preserve for appellate review defendant's argument that the State committed a *Batson* violation (by peremptorily striking the sole Black member of the prospective jury pool), despite there being no direct evidence of the race of any of the prospective jurors and no verbatim transcript of the voir dire, because the parties' arguments at the *Batson* hearing showed no dispute regarding defendant's race and that of the removed prospective juror and therefore amounted to a stipulation.

2. Constitutional Law—Batson challenge—consideration of all evidence presented—totality of circumstances—remanded for further findings

In overruling defendant's *Batson* claim (based on the State peremptorily striking the sole Black member of the prospective jury pool), the trial court failed to make the necessary findings of fact demonstrating it considered all of defendant's arguments and evidence, including a comparative juror analysis and contention that the prosecutor's striking of a Black prospective juror for using a certain "tone of voice" had racial implications (as required pursuant to the clarifying principles set forth in *State v. Hobbs*, 374 N.C. 345 (2020), issued after the trial court's decision in this case). The matter was remanded for the trial court to make further findings and to explain how it weighed the totality of the circumstances in a new ruling.

3. Costs—costs assessed in multiple criminal judgments—N.C.G.S. § 7A-304—meaning of "criminal case"—multiple related charges

Although defendant's criminal case for numerous drug charges resulted in four separate judgments against him, the trial court violated N.C.G.S. § 7A-304(a) by assessing costs in each of the four judgments. *State v. Rieger*, 267 N.C. App. 647 (2019), interpreted the statute's authorization of assessment of costs "[i]n every criminal case" as meaning only one assessment of costs for a case that encompasses multiple criminal offenses arising from the same act or transaction or series of acts or transactions. In this case, the State successfully moved to join all of defendant's charges for trial on the basis that the offenses were connected. The judgments were vacated and the matter remanded for the trial court to enter new judgments, only one of which may include assessed costs.

Appeal by Defendant from judgments entered 20 March 2019 by Judge Julia Lynn Gullett in Yadkin County Superior Court. Heard in the Court of Appeals 11 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.

Daniel J. Dolan for Defendant-Appellant.

INMAN, Judge.

Defendant, who is Black, challenged during his criminal trial a prosecutor's peremptory strike of the only Black juror in the venire as racially motivated and prohibited by *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). Though the trial court heard thorough arguments and announced findings of fact and conclusions of law to support its ruling, it did not make a record adequately addressing the totality of circumstances presented to it as required by recent clarifying caselaw. As a result, we remand the matter for further proceedings addressing Defendant's *Batson* claim.

We also vacate three of the judgments to correct an error in the assessment of costs, and remand for the entry of judgments without costs should Defendant's *Batson* claim fail on remand.

I. FACTUAL AND PROCEDURAL HISTORY

Defendant was arrested in February 2017 on eight drug charges. The State's evidence at trial tended to show that Defendant sold cocaine to an undercover Yadkin County law enforcement officer on at least four different occasions during April and May of 2015.

In January of 2018, Defendant was indicted by a grand jury on four counts of possession with intent to sell and deliver cocaine, four counts of selling and delivering cocaine, and one charge of attaining habitual felon status. The State filed a motion to join all the charges for trial on 5 July 2018, averring that "the offenses are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." The trial court granted that motion without objection from Defendant during the pretrial motions hearing on 18 March 2019. Defendant pled not guilty to all charges, and the case proceeded to trial later that day.

Defendant is Black. Of the 34 people in the pool of prospective jurors, only one person, Mr. Robinson,[1] was Black. Jury selection was not transcribed, and no jurors were polled on their race or ethnicity.

Mr. Robinson was questioned after the State had accepted ten jurors and had stricken two jurors peremptorily. During *voir dire*, Mr. Robinson discussed his employment history and current employment status, his wife's classes from an online university that he could not identify, and a prior criminal charge for child abuse that was dismissed

1. The trial transcript refers to Mr. Robinson as both "Shane Robinson" and "Sean Robinson" at different times. We refer to him by his last name throughout the opinion for ease of reading.

without a conviction. The prosecutor used a peremptory strike on Mr. Robinson. Defendant objected on *Batson* grounds.

In a hearing outside the presence of the jury, Defendant's counsel asserted that the State's decision to strike the only Black prospective juror in the trial of a Black defendant constituted a *prima facie* showing of racial discrimination in jury selection under *Batson*. The State did not challenge Defendant's characterization of Mr. Robinson as Black, nor his assertion that a *prima facie* case of discrimination had been made. Instead, the prosecutor offered several "race neutral options or the reason [he] struck him."

The prosecutor noted Mr. Robinson's "tone of voice" and the "context" of his statements about his job history, which led the prosecutor to surmise that Mr. Robinson had been fired but "was reluctant to talk about it." Though the prosecutor could have confirmed this hunch through further questioning, he explained to the trial court that he declined to do so because he "didn't want to embarrass" Mr. Robinson. The prosecutor also "found troubling" Mr. Robinson's statement that he had been unemployed for a year, making him "the only juror we talked to so far that did not have a legitimate basis of employment and certainly the longest period of anybody we've talked to." The prosecutor said he was further concerned by Mr. Robinson's inability to identify which university his wife attended online. He then summarized his rationale:

> [T]he gentleman struck me as someone who was just not a reasonable citizen basically. He has no job, he has no idea what his wife was doing, [the prosecutor] found him credible on his allegation of child abuse, [which was] the most serious criminal act that we've really dealt with any specificity from anybody on the panel.

Defendant argued that the State's proffered reasons for the peremptory strike were pretextual. He pointed out that Mr. Robinson had described "some type of deferred prosecution," and that the State had accepted a white juror who had a previous marijuana possession charge resolved through a deferred prosecution. He also disagreed with the State's characterization of Mr. Robinson's testimony, contending that Mr. Robinson said he was employed.[2] Further, Defendant argued

2. Defendant contends on appeal that the prosecutor misrepresented that Mr. Robinson was unemployed. We are unable to entertain this contention; both Defendant and the State presented their differing recollections of Mr. Robinson's testimony to the trial court, and it resolved this factual issue by finding as a fact that he said he "has been out of work for a year." Without a transcript of *voir dire*, we are bound to leave that factual determination by the trial court undisturbed.

that the prosecutor's statements about Mr. Robinson's "tone of voice . . . may show some racial issues."

The prosecutor acknowledged the white juror's criminal history, but asserted that "he said he felt he had been treated fairly and implicitly admitted his guilt in that crime, and [the prosecutor] didn't get kind of the same reaction from Mr. Robinson which was the distinction there." Defendant then pointed out that "Mr. Robinson stated he felt like he was treated fairly and . . . you have two jurors that have some type of criminal history, it sounds like they both were deferred proceedings that were later dismissed. They both stated that they felt that they had been treated fairly." Defendant also noted that, like his case, the white juror's "criminal problems or issues actually dealt with drugs, so . . . that makes it even stronger as far as our argument is concerned."

The trial court found that Defendant did not prove purposeful discrimination and overruled his *Batson* objection. The trial court explained from the bench that it had heard all three steps of Defendant's *Batson* challenge before making the following oral ruling:

> THE COURT: The Court has observed the manner and appearance of counsel and jurors during voir dire and has made all relevant determinations of credibility for purposes of this order.
>
> In making these findings of fact, the Court has made determinations as to the race of various individuals. As to the jurors, any findings of race are based upon representations during the arguments of attorneys.
>
> . . . .
>
> The Court finds that as to parties, lawyers, witness's finding of race are based upon statements of counsel. The Court finds that the Defendant in this case is black.
>
> . . . .
>
> [I]t appears that there was only one person of the African-American race on the jury in the jury pool to the best of the Court's determination.
>
> The Court finds that the only potential juror in the pool that appeared to be African-American was juror number 11, Mr. Sean Robinson.
>
> The Court finds that upon questioning juror number 11, that the prosecutor elicited that juror number 11 worked

at Lydall, until he had to make other arrangements and has been out of work for a year. That his wife was in school. That she was attending school on the computer. That he did not have any idea of what school she was attending. That the prosecutor found him credible on the child-abuse allegations, but that the prosecutor was troubled concerning his employment history and the fact that he had no idea where his wife was attending school or what school she was attending. The defense is concerned because this was the only African-American or appeared to be the only African-American person in the jury pool which would effectively be a 100 percent rejection rate of African-American jurors.

. . . .

The Court finds that the State has used a disproportionate number of preemptory challenges to strike African-American jurors in this case, and that on its face, the State's acceptance rate of potential African-American jurors indicates the likelihood of discrimination in the jury selection process. So the Defendant would've made a prima facie showing based upon the percentage.

Upon the establishment of a prima facie showing of discrimination, the Court considers the racially neutral reasons offered by the State . . . . The reasons offered by the State were the employment history of [Mr. Robinson] and his answers and tone of voice concerning that history. The fact that his wife was in college, that he had no idea what school she was attending, and the troubling situation with the child abuse issues, although the prosecutor found them to be credible in his answers to that.

The Defendant was offered the opportunity to rebut those reasons and indicated, again, that the 100 percent rejection rate was troubling, and that another juror had previous drug charges and that he was not excused.

The Court does find the prosecutor to be credible in stating racially neutral reasons for the exercise of the [peremptory] challenge. In response to such reasons, defense counsel has not shown that the Prosecutor's explanations are [pretextual].

> Based upon consideration of the presentations made by both sides and taking into account the various arguments presented, the Defendant has not proven purposeful discrimination in the jury selection process.
>
> Based on the foregoing findings of fact, the Court concludes as a matter of law that because the Defendant may have a prima facie showing in the selection process, . . . and that the reasons that the prosecutor stated were racially neutral, and the Court does find the Prosecutor to be credible in those reasonings.
>
> So taken in the totality in connection with all the findings of fact, the Court does find that he had a . . . sufficient racially neutral basis for the exercise of a [peremptory] challenge[] as to that juror. Therefore, the objection to the State's exercise of [peremptory] challenge as to potential juror number 11, Mr. Robinson . . . is overruled and the [peremptory] challenge is allowed.

Jury selection then resumed. The jury ultimately convicted Defendant on all counts, and the trial judge imposed four consecutive judgments, assessing costs in each. Defendant appeals.

II. ANALYSIS

Defendant presents two principal arguments on appeal: (1) the trial court erred in denying his *Batson* challenge or, in the alternative, failed to make adequate findings of fact under the totality of the circumstances as explained in *State v. Hobbs*, 374 N.C. 345, 841 S.E.2d 492 (2020); and (2) the trial court violated N.C. Gen. Stat. § 7A-304 in assessing costs in each of the four judgments rather than only once consistent with *State v. Rieger*, ___ N.C. App. ___, 833 S.E.2d 699 (2019). The State, in addition to addressing Defendant's first argument on the merits, contends that he failed to adequately preserve his *Batson* challenge for review. As to the second argument, the State recognizes that the underlying rationale of *Rieger* may require vacatur of the judgments for a single imposition of costs. We address each line of inquiry in turn.

A. Standards of Review

In evaluating a *Batson* challenge, "[t]he trial court has the ultimate responsibility of determining whether the defendant has satisfied his burden of proving purposeful discrimination." *Hobbs*, 374 N.C. at 349, 841 S.E.2d at 497 (citations and quotation marks omitted). Such a determination is afforded "great deference" on appeal, *State v. Golphin*,

352 N.C. 364, 427, 533 S.E.2d 168, 211 (2000) (citations omitted), with reviewing courts "overturning it only if it is clearly erroneous." *Hobbs*, 374 N.C. at 349, 841 S.E.2d at 497 (citation omitted). Trial courts faced with resolving a *Batson* claim "must make specific findings of fact at each stage of the *Batson* inquiry that it reaches" in aid of the standard's application upon appellate review. *State v. Headen*, 206 N.C. App. 109, 114, 697 S.E.2d 407, 412 (2010) (citation and quotation marks omitted).

Alleged statutory violations are, by contrast, subject to no deference whatsoever. *State v. Johnson*, 253 N.C. App. 337, 345, 801 S.E.2d 123, 129 (2017). "Alleged statutory errors are questions of law and as such, are reviewed *de novo*." *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (internal citations omitted). We therefore analyze Defendant's argument that the trial court failed to comply with N.C. Gen. Stat. § 7A-304 in its imposition of costs by "considering the matter anew and freely substituting our own judgment for that of the trial court." *State v. Edgerton*, 266 N.C. App. 521, 525, 832 S.E.2d 249, 253 (2019) (citation omitted).

B. Preservation

[1] The State contends in its principal brief that Defendant's *Batson* challenge was not preserved because: (1) the record does not disclose direct evidence of Mr. Robinson's race, and Defendant failed to "make a record which shows the race of a challenged juror," *State v. Willis*, 332 N.C. 151, 162, 420 S.E.2d 158, 162 (1992) (citation omitted); and (2) jury selection was neither recorded nor reconstructed by a narrative agreed upon by the parties, leaving us with only counsels' descriptions of *voir dire*, their *Batson* arguments, and the trial court's examination of and ruling on the same. Reviewing the record and recent caselaw, we disagree with the State on both points and hold the record is "minimally sufficient to permit appellate review." *State v. Campbell*, 272 N.C. App. 554, 558, 846 S.E.2d 804, 807 (2020).

The State correctly notes that the record does not contain direct evidence of Mr. Robinson's racial identity or the racial identity of other jurors. However, such direct evidence is not strictly required where the record discloses "what amounts to a stipulation of the racial identity of the relevant prospective jurors." *State v. Bennett*, 374 N.C. 579, 595, 843 S.E.2d 222, 233 (2020).

In *Bennett*, a defendant brought a *Batson* claim but did not establish the race of the jurors struck by the State on the record through self-identification or other direct evidence. *Id.* at 591, 843 S.E.2d at 231. What the record did reveal, however, was an agreement between the

State, defendant's counsel, and the trial court that the challenged jurors were Black. *Id.* at 594, 843 S.E.2d at 233. Our Supreme Court held that this agreement was sufficient to permit appellate review because "the record reveals the complete absence of any dispute among counsel for the parties and the trial court concerning the racial identity of the persons who were questioned during the jury selection process, . . . resulting in what amounts to a stipulation of the racial identity of the relevant prospective jurors." *Id.* (citations omitted). In announcing its holding, the Supreme Court further explained that "[w]hile a stipulation must be definite and certain in order to afford a basis for judicial decision, stipulations and admissions may take a variety of forms and *may be found by implication*." *Id.* (emphasis added) (citations, alterations, and quotation marks omitted). In doing so, it distinguished its earlier decisions in *State v. Mitchell*, 321 N.C. 650, 365 S.E.2d 554 (1988), *State v. Payne*, 327 N.C. 194, 394 S.E.2d 158 (1990), and *State v. Brogden*, 329 N.C. 534, 407 S.E.2d 158 (1991), wherein defendants unsuccessfully "attempted to establish the racial identities of each of the prospective jurors on the basis of the subjective impressions of a limited number of trial participants." *Bennett*, 374 N.C. at 594, 843 S.E.2d at 233.

Defendant's counsel in this case opened his *Batson* argument by asserting that "[a]s far as a prima facie case, . . . my client is African-American . . . . There was one African-American that was on the jury pool; that juror was brought to the jury box, and he was peremptorily challenged[.]" Rather than rebut Defendant's *prima facie* case—by, for example, arguing that Mr. Robinson was *not* Black or that there were other Black jurors passed by the State—the prosecutor apparently conceded the question and instead proceeded to "offer . . . a race neutral . . . reason" for striking Mr. Robinson. This absence of any dispute as to Mr. Robinson's race (or whether any other jurors were Black) continued through the parties' additional arguments back and forth, and was reflected in the trial court's determination of Mr. Robinson's race from the bench:

> In making these findings of fact, the Court has made determinations as to the race of various individuals. As to the jurors, any findings of race are based upon representations during the arguments of attorneys.
>
> . . . .
>
> The Court finds that as to parties, lawyers, witness's finding of race are based upon statements of counsel. The Court finds that the Defendant in this case is black.

. . . .

> That as of the time that the State attempted to exercise this [peremptory] challenge, 10 jurors have been accepted by the State of which to the best of the Court's determination 10 are white and zero are black. That as of the time the State attempted to exercise that [peremptory] challenge, the State had exercised two . . . [peremptory] challenges of which zero were persons of an African-American race.
>
> As a matter of fact, it appears that there was only one person of the African-American race on the jury in the jury pool to the best of the Court's determination.
>
> The Court finds that the only potential juror in the pool that appeared to be African-American was juror number 11, Mr. Sean Robinson.

We acknowledge that, unlike in *Bennett*, the prosecutor did not expressly state Mr. Robinson's race or the race of other jurors on the record below. This distinction does not alter our holding that the parties effectively entered into a stipulation to that effect. As recognized in *Bennett*, "stipulations and admissions may take a variety of forms and may be found by implication." 374 N.C. at 594, 843 S.E.2d at 233 (quotation marks and citations omitted). And, as the Supreme Court has elsewhere observed, "[s]ilence, under some circumstances, may be deemed assent." *State v. Alexander*, 359 N.C. 824, 828, 616 S.E.2d 914, 917 (2005) (citations and quotation marks omitted); *see also State v. Hurley*, 180 N.C. App. 680, 684, 637 S.E.2d 919, 923 (2006) ("Stipulations do not require affirmative statements and silence may be deemed assent in some circumstances, particularly if the defendant had an opportunity to object, yet failed to do so." (citing *Alexander*, 359 N.C. at 828-29, 616 S.E.2d at 917-18)).[3] Stated differently, because "the record reveals

3. We also note, as the Supreme Court did in *Bennett*, that the core inquiry in a *Batson* challenge is "whether the *prosecutor* is excluding people from a jury because of their race," *Bennett*, 374 N.C. at 596 n.4, 843 S.E.2d at 234 n.4 (emphasis added), suggesting that it is the *prosecutor's* understanding of the prospective juror's race that ultimately matters for purposes of analysis. The prosecutor's tacit acknowledgment that the challenged juror was Black distinguishes this case from those in which the record contained no indication of the prosecutor's belief as to the prospective juror's race. *See Mitchell*, 321 N.C. at 655-56, 365 S.E.2d at 557 (holding a court reporter's notation as to prospective jurors' races would not create an adequate record for review because "[t]he court reporter . . . is in no better position to determine the race of each prospective juror . . . . An individual's race is not always easily discernable, and the potential for error by a court reporter acting alone is great"); *Payne*, 327 N.C. at 200, 394 S.E.2d at 161 (holding a defendant failed to establish the races of prospective jurors on the record when the only evidence was

the complete absence of any dispute among counsel for the parties and the trial court concerning the racial identity of the persons who were questioned during the jury selection process," *Bennett*, 374 N.C. at 595, 843 S.E.2d at 233, Defendant's failure to elicit direct evidence of Mr. Robinson's race or the race of other jurors does not preclude our review.

The lack of a verbatim transcript of *voir dire* also does not *per se* preclude *Batson* review. *State v. Sanders*, 95 N.C. App. 494, 499, 383 S.E.2d 409, 412 (1989); *see also Campbell*, 272 N.C. App. at 558, 846 S.E.2d at 807 (reviewing a *Batson* claim absent a *voir dire* transcript). The transcript of the *Batson* hearing reflects the following details: (1) Defendant's race; (2) Mr. Robinson's race; (3) the absence of any other Black jurors in the jury pool; (4) the number of non-Black jurors passed by the State and the number and percentage of peremptory challenges aimed at Black jurors; (5) the State's proffered reasons for striking Mr. Robinson; and (6) Defendant's arguments and evidence that those reasons revealed racial bias. We are therefore satisfied that the record in this case suffices to permit appellate review.

C. Defendant's Batson *Challenge*

[2] A *Batson* claim is resolved in three stages:

> First, defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race. Second, if such a showing is made, the burden shifts to the prosecutor to offer a racially neutral explanation to rebut defendant's *prima facie* case. Third, the trial court must determine whether the defendant has proven purposeful discrimination.

State v. Cummings, 346 N.C. 291, 307-08, 488 S.E.2d 550, 560 (1997) (citations omitted). It is imperative that "the trial court . . . make specific findings of fact at each stage of the *Batson* inquiry that it reaches." *State v. Cofield*, 129 N.C. App. 268, 275, 498 S.E.2d 823, 829 (1998) (citation omitted).

Our Supreme Court has recently explained what the third stage of a Batson inquiry requires:

> "The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and

---

an "affidavit . . . contain[ing] only the perceptions of one of the defendant's lawyers concerning the races of those excused" (citation omitted)); *Brogden*, 329 N.C. at 546, 407 S.E.2d at 166 (holding an affidavit disclosing defendant's counsel's impressions of jurors' races and notations in the record by the court reporter of her impressions was inadequate to establish a reviewable record on appeal).

> circumstances, and in light of the arguments of the parties." *Flowers* [*v. Mississippi*, ___ U.S. ___, ___, 204 L. Ed. 2d 638, 656 (2019)]. At the third step, the trial court "must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Id.* at [___, 204 L. Ed. 2d. at 656]. "The ultimate inquiry is whether the State was 'motivated in substantial part by discriminatory intent.' " *Id.* (quoting *Foster v. Chatman*, ___ U.S. ___, 136 S. Ct. 1737, 1754, 193 L. Ed. 2d 1 (2016)).

Hobbs, 374 N.C. at 353, 841 S.E.2d at 499. It reiterated that the trial court is "requir[ed] . . . to consider *all of the evidence before it* when determining whether to sustain or overrule a *Batson* challenge." *Id.* at 358, 841 S.E.2d at 502 (citations omitted) (emphasis added). Thus, "when a defendant presents evidence raising an inference of discrimination, a trial court, and a reviewing appellate court, must consider that evidence in determining whether the defendant has proved purposeful discrimination in the State's use of a peremptory challenge." *Id.* at 356, 841 S.E.2d at 501.

In *Hobbs*, the trial court conducted a complete *Batson* analysis after the defendant's objections to several peremptory strikes by the State. *Id.* at 348, 841 S.E.2d at 496. In the course of his arguments, the defendant pointed to several different factors demonstrating discrimination and indicating pretext in the State's explanation of its peremptory strikes, including a history of racial discrimination in jury selection in the county. *Id.* Our Supreme Court held that the trial court erred in denying the defendant's *Batson* challenge because "the trial court did not explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges, including the historical evidence that Mr. Hobbs brought to the trial court's attention." *Id.* at 358, 841 S.E.2d at 502. Mr. Hobbs also argued at trial and on appeal that his *Batson* claim was supported by a comparison between white jurors who had been passed by the State and Black jurors who were peremptorily challenged. *Id.* at 357, 841 S.E.2d at 502. Although the trial court conclusively stated it " 'further considered' Mr. Hobbs's arguments in that regard[,]" *id.*, our Supreme Court held that the trial court erred in "failing to engage in a comparative juror analysis." *Id.* at 360, 841 S.E.2d at 503. This error stemmed in part from the fact that the Court "d[id] not know from the trial court's ruling how or whether these comparisons were evaluated." *Id.* at 359, 841 S.E.2d at 502. Considering

these errors together, the Supreme Court held that "[t]he trial court . . . failed to either conduct any meaningful comparative juror analysis or to weigh any of the historical evidence of racial discrimination in jury selection presented by Mr. Hobbs. This failure was erroneous and warrants reversal." *Id.* at 359-60, 841 S.E.2d at 503. As a result, the Supreme Court remanded the matter to the trial court to "conduct a new hearing on these claims." *Id.* at 360, 841 S.E.2d at 503.

Although the trial court did not have the benefit of *Hobbs* when it made its ruling, that decision requires us to remand this case to the trial court to make the findings necessary to resolve a *Batson* claim. Defendant offered several arguments in support of his *Batson* challenge, including a contention that a comparative juror analysis revealed racial bias in the State's decision to strike Mr. Robinson on the grounds of criminal history. As pointed out by Defendant, Mr. Robinson and a white juror passed by the State had prior criminal charges that had been dismissed.[4] Both parties acknowledged that, unlike Mr. Robinson, the white juror's criminal history involved drug charges, which, given Defendant was himself on trial for drug-related offenses, Defendant contended made the prosecutor's decisions all the more suspect. However, we have no indication from the trial court as to "how or whether th[is] comparison[] w[as] evaluated." *Id.* at 359, 841 S.E.2d at 502. The trial court's acknowledgement that "Defendant . . . indicated . . . that another juror had previous drug charges and that he was not excused," coupled with its conclusion "taking into account the various arguments presented [that] the Defendant has not proven purposeful discrimination in the jury selection process," sheds no more light on those questions than the trial court's conclusory statement in *Hobbs* that it had " 'further considered' Mr. Hobbs's [comparative juror] arguments." *Id.* at 357, 841 S.E.2d at 502.[5]

---

4. Read in context, it appears from the transcript that both the State and Defendant agreed that the white juror's drug charges were resolved pursuant to N.C. Gen. Stat. § 90-96 (2019), which provides a procedure for discharging and dismissing a drug charge without adjudication or conviction under certain circumstances. N.C. Gen. Stat. § 90-96(a). While there is no similar outward agreement on the exact disposition of Mr. Robinson's child abuse charge in the record, the prosecutor described it as an "allegation" and did not challenge Defendant's assertion that it had been deferred and/or dismissed when attempting to distinguish Mr. Robinson from the purportedly similar white juror. The trial court's findings of fact similarly describe them as "child-abuse allegations" as opposed to a conviction.

5. The State argues that no comparative juror analysis was required because Mr. Robinson and the white juror passed by the State were too dissimilar to allow for a meaningful comparison. Defendant's comparative juror analysis is, however, at least colorable: "Evidence about similar answers between similarly situated white and nonwhite jurors is

We also hold that the trial court erred in failing to address Defendant's argument that the prosecutor's comments about "tone of voice and those types of issues . . . go to racial stereotypes also." While it is true that the trial court's oral ruling includes Mr. Robinson's "answers and tone of voice" among the prosecutor's reasons for exercising the strike, the oral ruling did not mention Defendant's specific assertion that this reason suggested racial bias. We thus cannot discern how this contention factored into the totality of the circumstances under consideration by the trial court.

To be sure, a juror's demeanor and responses to questioning may be race-neutral reasons for a peremptory challenge sufficient to satisfy the State's burden at the second step of *Batson*. *See State v. Smith*, 328 N.C. 99, 126, 400 S.E.2d 712, 727 (1991) ("[A] prospective juror's nervousness or uncertainty in response to counsel's questions may be a proper basis for a peremptory challenge, absent defendant's showing that the reason given by the State is pretextual."). But such reasons are not immune from scrutiny or implicit bias. *See Batson*, 476 U.S. at 106, 90 L. Ed. 2d at 94 (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to . . . a characterization that would not have come to his mind if a white juror had acted identically."); *Harris v. Hardy*, 680 F.3d 942, 965 (7th Cir. 2012) (observing that "[d]emeanor-based explanations for a strike are particularly susceptible to serving as pretexts for discrimination").[6] When a defendant asserts

---

relevant to whether the prosecution's stated reasons for exercising a peremptory challenge are mere pretext for racial discrimination. Potential jurors do not need to be identical in every regard for this to be true." *Hobbs*, 374 N.C. at 359, 841 S.E.2d at 502-03 (citations omitted). As explained *supra*, we are unable to discern from its order "how or whether" the trial court considered Defendant's argument in its ultimate determination under the totality of the circumstances. *Id*. at 359, 841 S.E.2d at 502.

6. The transcript shows that the prosecutor relied on Mr. Robinson's "tone of voice" to justify an assumption that Mr. Robinson had been fired from his last job. However, the prosecutor declined to confirm this assumption by further questioning Mr. Robinson because his "tone of voice" also indicated to the prosecutor that he would have been embarrassed to discuss it if asked. Though we do not know how the prosecutor questioned other jurors, we agree with Defendant's observation at oral argument that the manner in which prosecutors approach the questioning of a juror may provide race-neutral cover for a biased strike. *Cf. Flowers*, ___ U.S. at ___, 204 L. Ed. 2d at 660-61 ("[D]isparate questioning and investigation of prospective jurors on the basis of race can arm a prosecutor with seemingly race-neutral reasons to strike the prospective jurors of a particular race." (citation omitted)). Just as "[p]rosecutors can decline to seek what they do not want to find about white prospective jurors" to frustrate comparative juror analyses, *id*. at ___, 204 L. Ed. 2d at 661, they can decline a full examination of a Black juror to avoid answers that would foreclose a possible race-neutral rationale to strike. A prosecutor's "legitimate hunches" may be facially valid and satisfy the State's burden at the second step of *Batson*, *Headen*, 206 N.C. App. at 116, 697 S.E.2d at 413 (citation and quotation

that a facially race-neutral reason nonetheless suggests racial bias, a trial court must consider that assertion under the totality of the circumstances. *See Flowers*, ___ U.S. at ___, 204 L. Ed. 2d at 656 ("The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties."); *Hobbs*, 374 N.C. at 356, 841 S.E.2d at 501 ("[W]hen a defendant presents evidence raising an inference of discrimination, a trial court, and a reviewing appellate court, must consider that evidence in determining whether the defendant has proved purposeful discrimination in the State's use of a peremptory challenge.").[7] The trial court must resolve a *Batson* challenge through "specific findings of fact." *Cofield*, 129 N.C. App. at 275, 498 S.E.2d at 829 (citation omitted). Without findings of fact regarding such a fact-specific issue, appellate review is impossible. *Id.* In the absence of necessary findings by the trial court, we must remand.

This case differs materially from earlier cases in which we had no transcript of the *voir dire* and upheld trial courts' denial of *Batson* challenges without further review. In *Sanders*, for example, the defendant offered no reviewable evidence or argument in response to the State's race-neutral reasons for its strikes, leaving this Court no option but to "accept the State's proffered reasons as rebutting the prima facie case of discrimination." 95 N.C. App. at 502, 383 S.E.2d at 414. Here, by contrast, Defendant presented to the trial court a comparable juror analysis and cited the prosecutor's use of particular language in justifying his strike as specific evidence to support Defendant's *Batson* challenge.[8]

---

marks omitted), but they are still subject to rebuttal and review under the totality of the circumstances at the third step. *See Flowers*, ___ U.S. at ___, 204 L. Ed. 2d at 656 ("The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties."); *Hobbs*, 374 N.C. at 359, 841 S.E.2d at 503 (holding that this Court "failed to weigh all the evidence put on by Mr. Hobbs, instead basing its conclusion on the fact that the reasons articulated by the State have, in other cases, been accepted as race-neutral" (citation omitted)).

7. The totality of the circumstances in this case also includes the questionable assertion by the prosecutor that Mr. Robinson "was just not a reasonable citizen" because he had been unemployed for a year and did not know which university his wife was attending online. *See, e.g.*, *Miller-El v. Cockrell*, 537 U.S. 322, 339, 154 L. Ed. 2d 931, 951 (2003) (observing that assessment of a prosecutor's race-neutral explanations turns in part on "how reasonable, or how improbable, the explanations are").

8. The trial court in *Campbell* resolved the *Batson* claim at the first stage of analysis, leading us to distinguish *Hobbs* in part on that basis. 272 N.C. App. at 559 n.2, 846 S.E.2d at 808 n.2. This case is markedly different, as it involves an order entered at the third stage of a *Batson* inquiry—after the State conceded and the trial court found that the evidence established a *prima facie Batson* challenge—that did not specifically address evidence and arguments necessary to resolve a claim at that stage.

We are unable to discern from the record how or whether the trial court considered Defendant's comparative juror argument and his contention that the prosecutor's concern about Mr. Robinson's "tone of voice" evinced racial bias. Because the trial court failed to enter findings regarding these issues, we are bound by *Hobbs* to reverse its denial of Defendant's *Batson* challenge. *Hobbs*, 374 N.C. at 358, 841 S.E.2d at 502. We remand the matter to the trial court for further specific findings. *Id.* at 360, 841 S.E.2d at 504. On remand, the trial court may take additional evidence in its discretion, but shall in any event make specific findings of fact under the totality of *all* the circumstances at the third step of its *Batson* analysis, including, but not limited to, findings: (1) disclosing how or whether a comparative juror analysis was conducted; and (2) addressing Defendant's assertion that the prosecutor's statements regarding Defendant's answers and tone of voice evinced racial bias.

In sum, our review of Defendant's appeal is controlled by recent United States and North Carolina Supreme Court decisions not available to the lower court at the time of trial. *Flowers*, ___ U.S. ___, 204 L. Ed. 2d 638; *Hobbs*, 374 N.C. 345, 841 S.E.2d 492. The trial court can hardly be blamed for failing to follow guidance that did not exist at the time of Defendant's *Batson* challenge. But a high court's decision applying federal constitutional law to a criminal judgment controls cases pending on appeal when that decision is announced. *See Whorton v. Bockting*, 549 U.S. 406, 416, 167 L. Ed. 2d 1, 11 (2007) (noting that decisions on constitutional law governing criminal judgments apply to cases pending "on direct review" (citation omitted)); *State v. Zuniga*, 336 N.C. 508, 513, 444 S.E.2d 443, 446 (1994) ("[A]vert[ing] to . . . federal retroactivity standards" in application of federal constitutional decisions (citations omitted)).

D. Assessment of Costs

[3] Defendant asserts the trial court's assessment of costs in each of the four judgments against him violates N.C. Gen. Stat. § 7A-304 as interpreted by *State v. Rieger*, 267 N.C. App. 647, 833 S.E.2d 699 (2019), and the State "acknowledges" *Rieger*'s interpretation of the statute. The statute provides for costs to be assessed "[i]n every criminal case," N.C. Gen. Stat. § 7A-304(a) (2019), and we have interpreted a single "criminal case" to encompass "multiple criminal charges aris[ing] from the same underlying event or transaction . . . adjudicated together in the same hearing or trial[.] . . . In this situation, the trial court may assess costs only once, even if the case involves multiple charges that result in multiple, separate judgments." *Rieger*, 267 N.C. App. at 652-53, 833 S.E.2d at 703. We adopted the interpretation in *Rieger* because "the intent of the General Assembly when it chose to require costs 'in every

criminal case' was to have those costs be proportional to the costs that this 'criminal case' imposed on the court system." *Id.*

Here, the State moved to join all of Defendant's charges for trial on the basis that "the offenses are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." That order was granted by the trial court without objection from Defendant, and all of the charges were heard in a single three-day trial. We see no difficulty in applying the rationale and rule announced in *Rieger* to these procedural facts, and the State's brief offers no substantive argument to support a deviation. As a result, we vacate the trial court's judgments so it may enter a new judgment in Case No. 17CRS050312 that assesses costs and new judgments in Case Nos. 17CRS050313-15 that do not.

III. CONCLUSION

We hold that in its ruling denying Defendant's objection to the State's peremptory strike of Mr. Robinson, the trial court failed to satisfy the constitutional requirements mandated by the North Carolina Supreme Court. On remand, the trial court must make specific findings as to all the pertinent evidence and arguments, including findings addressing Defendant's comparative juror analysis and "tone of voice" arguments. Once those findings are made, the trial court must "explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges." *Hobbs*, 374 N.C. at 358, 841 S.E.2d at 502. The trial court may, in its discretion, undertake any evidentiary procedures it deems necessary to comply with our mandate. Should it rule in Defendant's favor on his *Batson* challenge, Defendant shall receive a new trial. *See State v. Wright*, 189 N.C. App. 346, 354, 658 S.E.2d 60, 65 (2008) (granting a new trial on a *Batson* challenge).

We also vacate Defendant's judgments assessing costs inconsistent with *Rieger*. Should the trial court again reject Defendant's *Batson* claim, it shall enter a new judgment in Case No. 17CRS050312 that assesses court costs and new judgments in Case Nos. 17CRS050313-15 that do not.

REVERSED AND REMANDED IN PART; VACATED AND REMANDED IN PART.

Judges BRYANT and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
TEVIN O'BRIAN DALTON

No. COA20-248

Filed 20 October 2020

1. Motor Vehicles—fleeing to elude arrest—reasonable suspicion for initial stop—texting while driving—plain error analysis

In a case involving felony fleeing to elude arrest, the trial court did not err—much less commit plain error—by denying defendant's pretrial motion to suppress evidence obtained after the initial stop (and to which defendant did not object at trial). The specific facts (the officer saw a glow coming from within defendant's car at night, could see it was a mobile phone being held up by defendant who was alone, and, based on his experience, it appeared defendant was texting and/or reading texts while driving), supported the officer's reasonable suspicion that defendant was texting or reading text messages while driving in violation of N.C.G.S. § 20-137.4A(a)(1)-(2). The officer was not required to clearly see text messages on the phone or see defendant type a text message prior to the stop and the fact that defendant could have been using the phone for a valid purpose did not negate the reasonable suspicion that he was using the device for a prohibited purpose.

2. Sentencing—prior record level—error in prior record level worksheet—prejudice—notice required to seek additional point for being on probation at time of offense

In a sentencing proceeding for felony fleeing to elude arrest where defendant stipulated to having six prior record level points but—as conceded by the State—the prior record level worksheet should have reflected only five prior record level points, the error was prejudicial because it raised defendant's prior record level from a two to a three and the case was remanded for resentencing. The court rejected the State's argument that an additional point was nevertheless warranted because defendant was on probation during the commission of the crime since the State never gave written notice of intent to prove the existence of the prior record point as required by N.C.G.S. § 15A-1340.16(a)(6) and defendant did not waive notice.

Appeal by defendant from judgment entered 15 November 2019 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 22 September 2020.

Joshua H. Stein Attorney General, by Assistant Attorney General Nicholas W. Yates, for the State.

BJK Legal, by Benjamin J. Kull, for defendant.

ARROWOOD, Judge.

Tevin O'Brian Dalton ("defendant") appeals from the trial court's denial of his motion to suppress certain evidence before trial and the calculation and imposition of his sentence after trial. For the following reasons, we find no error in the trial court's denial of defendant's motion to suppress; however, we remand this matter to the Iredell County Superior Court for resentencing.

I. Background

Around ten o'clock in the evening of 11 November 2014, Statesville Police Officer Ben Hardy ("Officer Hardy") observed a white Mercedes traveling with a "large glow coming from inside the vehicle." Officer Hardy proceeded to follow the vehicle at which point he noticed a "more prevalent" glow emitting from the vehicle. Upon following the vehicle to a stop sign, Officer Hardy discovered that the glow was being produced by a cellular device held by the driver and sole occupant of the car. Officer Hardy testified that at this point he could "see the phone was up in the air, almost like in the center." It appeared that the driver was texting on the phone. Officer Hardy immediately relayed tag information to communications and initiated a stop of the vehicle based on the suspicion that the driver, which later turned out to be defendant, was texting while driving.

Upon approaching the vehicle, Officer Hardy notified the driver that he had been stopped for texting while driving. The driver "kind of laughed at that notion" and claimed that he was using the phone's "maps" application as he had "somewhere to get to." The Officer asked to see the driver's phone to confirm. Defendant voluntarily retrieved his phone and "immediately as soon as he turned his phone on, it was [on] a texting screen."

Officer Hardy then asked for the driver's license and registration. The driver did not provide either but identified himself as "Tevin Dalton." Officer Hardy returned to his vehicle to confirm the provided information in a law enforcement database called "CJLEADS," which displays pictures of persons entered into the system. Officer Hardy, thus, could have confirmed at this time that the individual driving the vehicle was in fact defendant.

However, before Officer Hardy had the opportunity to enter the foregoing information into CJLEADS, defendant drove off at a high rate of speed. Officer Hardy pursued the vehicle, which was traveling "well in excess of ninety [miles-per-hour]" in a thirty-five mile-per-hour zone. Due to its high speed and dangerous maneuvering, Officer Hardy lost sight of the vehicle shortly thereafter as defendant turned onto Interstate 77. For safety reasons, Officer Hardy was ordered to stop the pursuit. Officer Hardy complied and issued a "Be on the Look Out" or "BOLO" to the North Carolina Highway Patrol and other law enforcement agencies. Shortly afterward, Officer Hardy was notified that highway patrol had located the vehicle and "got in a chase with it also on the interstate." However, similar to Officer Hardy's chase, the highway patrol officer "lost sight of the vehicle and cancelled the[] pursuit because of safety reasons[.]"

When Officer Hardy returned to the station, he entered the name and date of birth supplied by the driver during the initial stop into CJLEADS. Defendant's profile appeared with his picture thus confirming that the driver of the Mercedes was in fact defendant. CJLEADS also indicated that defendant's driver's license had been revoked in North Carolina. At this juncture, as he had ascertained the identity of the driver of the subject vehicle, Officer Hardy went to the magistrate's office and swore out warrants on defendant for felonious fleeing to elude arrest and texting while driving.

Before trial, defendant filed a motion to suppress evidence obtained during the traffic stop, particularly the evidence identifying defendant as the driver of the vehicle. The trial court denied the motion during a pretrial hearing, finding that the "officer had reasonable suspicion to stop the vehicle to investigate further." At trial, in November 2019, neither defendant nor his counsel objected to Officer Hardy's testimony regarding evidence obtained during the traffic stop (*i.e.*, the information gathered from defendant that allowed Officer Hardy to identify defendant as the driver of the vehicle).

On 15 November 2019, the jury found defendant guilty of felonious fleeing to elude but not guilty to the charge of texting while driving. The State and counsel for defendant stipulated to six sentencing points (thus level III) for felony sentencing purposes. The trial court sentenced defendant to a minimum of ten and a maximum of twenty-one months' imprisonment. Defendant gave oral notice of appeal the same day.

II. Discussion

Defendant contends that the trial court committed plain error by denying his motion to suppress evidence obtained by Officer Hardy

during the traffic stop, specifically the information conveyed by defendant identifying him as the driver of the Mercedes. Defendant also avers that the trial court erred by sentencing him based on a miscalculation of his prior record level under the guidelines. We address each issue in turn.

A. Motion to Suppress

[1] At the outset, we note that neither defendant nor his trial counsel objected to Officer Hardy's testimony concerning the evidence defendant sought to suppress before trial. The trial court's "evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (emphasis in original) (citations omitted). By failing to renew his objection at trial, defendant waived review of this issue. *See, e.g.*, *State v. Adams*, 250 N.C. App. 664, 669, 794 S.E.2d 357, 361 (2016). However, "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest," the Court may "suspend or vary the requirements or provisions of any of the[] [appellate] rules in a case pending before it upon application of a party or upon its own initiative[.]" N.C.R. App. P. 2 (2020). In our discretion, we elect to reach the merits of defendant's appeal.

When reviewing a motion to suppress, the trial court's findings of fact are "conclusive and binding on appeal if supported by competent evidence." *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (2007). This Court reviews the trial court's conclusions of law *de novo*. *Id.* (citation omitted). But, as noted above, because defendant failed to object at trial, our standard of review of the admission of the challenged evidence is for plain error. *Adams*, 250 N.C. App. at 669, 794 S.E.2d at 361. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citation omitted) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "[Plain] error will often be one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]' " *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378)).

In the case before us, defendant contends that the trial court committed plain error by concluding that Officer Hardy was justified in stopping the Mercedes solely based on his observation that the "operator was using a cell phone while driving." Defendant points out that merely

"using a cell phone" is not criminal activity *per se*, and, therefore, the trial court erroneously concluded that the stop was justified based on a reasonable suspicion that "*non-criminal* activity was afoot." Alternatively, defendant argues that even if this Court finds that the trial court applied the correct legal standard, the lower court's conclusions of law were not supported by its findings of fact.

"Both the United States and North Carolina Constitutions protect against unreasonable searches and seizures." *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20). Traffic stops, such as the one at issue here, are historically reviewed under the framework espoused in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (citation omitted). Under *Terry* and its progeny, a "traffic stop is permitted if the officer has a 'reasonable, articulable suspicion that criminal activity is afoot.' " *Styles*, 362 N.C. at 414, 665 S.E.2d at 439 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000)). "The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)). "To meet the reasonable suspicion standard, it is enough for the officer to *reasonably believe* that a driver has violated the law." *State v. Johnson*, 370 N.C. 32, 38, 803 S.E.2d 137, 141 (2017) (emphasis in original) (citations omitted).

North Carolina, like other states, has statutorily proscribed certain uses of mobile telephones while operating a motor vehicle. The relevant provision in this State reads, in pertinent portion, the following:

> (a) Offense.--It shall be unlawful for any person to operate a vehicle on a public street or highway or public vehicular area while using a mobile telephone to:
>
> (1) Manually enter multiple letters or text in the device as a means of communicating with another person; or
>
> (2) Read any electronic mail or text message transmitted to the device or stored within the device, provided that this prohibition shall not apply to any name or number stored in the device nor to any caller identification information.

N.C. Gen. Stat. § 20-137.4A(a)(1)-(2) (2019). However, the General Assembly has carved out various exceptions to these proscriptions:

(b) Exceptions.–The provisions of this section shall not apply to:

(1) The operator of a vehicle that is lawfully parked or stopped.

(2) Any of the following while in the performance of their official duties: a law enforcement officer; a member of a fire department; or the operator of a public or private ambulance.

(3) The use of factory-installed or aftermarket global positioning systems (GPS) or wireless communications devices used to transmit or receive data as part of a digital dispatch system.

(4) The use of voice operated technology.

N.C. Gen. Stat. § 20-137.4A(b)(1)-(4).

In this action, at the conclusion of the pre-trial suppression hearing, the trial judge made the following findings of fact:

> In this matter the Court makes the following findings of fact:
>
> That on November 11th, 2014 Officer Ben Hardy of the Statesville Police Department was patrolling within the city limits of Statesville.
>
> That he observed a vehicle cross over Broad Street from Green Street.
>
> That Officer Hardy observed what he thought was a glow inside the vehicle.
>
> That Officer Hardy turned onto the--onto Green Street. At that point, the vehicle in question was in front of him. At that point, Officer Hardy observed what appeared to be a cell phone screen through the back window of the vehicle, whereupon the vehicle stopped at a stop sign. That at that point, what appeared to be a cell phone screen was clear in the air toward the center of the car.
>
> That it appeared to the officer that there was only one occupant of the vehicle.

> And the officer believed that the operator was using a cell phone while driving.
>
> The Court observed the dash cam vehicle. And the Court observed in the video what the officer described.
>
> The Court therefore finds that the officer had reasonable suspicion to stop the vehicle to investigate further.

These findings and conclusions were supported, in large part, by the testimony of Officer Hardy. Based on his observations and experience, Officer Hardy testified that he did not stop defendant for merely using a cell phone; the car was stopped for actively using a mobile device while operating a motor vehicle in a manner that Officer Hardy reasonably believed was proscribed by N.C. Gen. Stat. § 20-137.4A. Officer Hardy observed defendant using and handling a cellular device while traveling on multiple streets in a manner consistent with texting or reading text messages—which is unlawful per N.C. Gen. Stat. § 20-137.4A(a)(1)-(2). Officer Hardy opined that, based on his experience, had defendant been using a "mapping system" on the device as he claimed, "it would be a look, and then [placing the phone] down as opposed to holding it up the entire street just to get to a stop sign, and then to make a left turn onto a street."

Defendant argues that as a foundation for reasonable suspicion, Officer Hardy was required to clearly see text messaging on defendant's cell phone or watch him type out a text message. However, requiring a law enforcement officer to confirm the specific use of the mobile device as a precondition to making an investigatory stop would be essentially requiring proof beyond a reasonable doubt. While reasonable suspicion is more than a mere hunch, it is surely a much less demanding standard than proof beyond a reasonable doubt. *See State v. Schiffer*, 132 N.C. App. 22, 27, 510 S.E.2d 165, 168 (1999) (finding that officer had reasonable suspicion to stop vehicle after noticing out-of-state tags and window tinting which the officer believed was darker than permitted under North Carolina law); *State v. Kincaid*, 147 N.C. App. 94, 98, 555 S.E.2d 294, 298 (2001) (holding that officer had reasonable suspicion to stop vehicle for revoked license based on his personal knowledge of defendant); *State v. Young*, 148 N.C. App. 462, 471, 559 S.E.2d 814, 821 (2002) (Greene, J. concurring) (recognizing that a "traffic stop based on an officer's mere suspicion that a traffic violation is being committed, but which can only be verified by stopping the vehicle, such as drunk driving or driving with a revoked license, is classified as an investigatory stop, also known as a *Terry* stop.") (citations omitted).

In sum, just because a person may be using a wireless telephone while operating a motor vehicle for a valid purpose does not, *ipso facto*, negate the reasonable suspicion that the person is using the device for a prohibited use. When reviewing N.C. Gen. Stat. § 20-137.4A(a) ("Unlawful use of mobile telephone for text messaging or electronic mail"), it is as probable that a driver using a cell phone is doing so to send or receive prohibited text messages as it is that the device is being used for one of many lawful purposes, perhaps more so. Indeed, it would be unlikely that someone, such as Officer Hardy, observing a person using a mobile device from afar, such as defendant, would be able to definitively determine the specific use of the device in hand. In any event, under the facts of this case, the trial court properly found that Officer Hardy had reasonable, articulable suspicion that defendant had violated the law such that the traffic stop was warranted.

We, therefore, hold that the trial court did not err, much less commit plain error, in denying defendant's motion to suppress. More specifically, we hold that the trial court's findings of fact, under the totality of the circumstances, support the conclusion that Officer Hardy had a reasonable, articulable suspicion to believe that criminal activity was afoot (*i.e.*, that defendant was using a cell phone in a manner proscribed by law). Having determined that the motion to suppress was properly denied, we do not address whether the alleged error had a probable impact on the jury's determination that defendant was guilty. We are cognizant that our holding may appear to create a rather perverse result: that is, either every driver using a cellular phone may be reasonably suspected of using the phone in an unlawful manner or no driver may be reasonably suspected of using a cellular phone in an unlawful manner. However, our holding is strictly limited to the facts of this case, which, as explained *supra*, indicate that there was additional indicia of criminal activity to justify the stop in addition to Officer Hardy's plain observation of defendant's use of a mobile device. Such determinations are fact specific and rely upon the evidence adduced at any trial on such a question. Our holding here should not be viewed as establishing a test sufficient to meet the reasonable suspicion test in other "texting-while-driving" cases.

B. Sentencing

[2] On 15 November 2019, following trial, the sentencing phase proceeded in this matter. Defendant stipulated to having six prior record level points and to being sentenced at prior record level three for felony sentencing purposes. Pursuant to these stipulations, the trial court

sentenced defendant within the presumptive range for the conviction of felonious fleeing to elude: ten to twenty-one months' imprisonment.

On appeal, defendant contends—and the State concedes—that defendant's prior record level worksheet should have reflected only five prior record level points, which, in that case, would have triggered sentencing under level two of the guidelines. The State, however, argues that because defendant was on probation for felonious identity theft when he committed the crime of felonious fleeing to elude, for which he was convicted in this underlying case, defendant obtained an additional sentencing point for being on probation during the commission of a felony. In other words, notwithstanding the fact that the stipulated prior record level worksheet included an extra misdemeanor point, the State contends that an additional sixth point was warranted because the underlying felony was committed while defendant was on probation in another case.

Pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7), one point is added to a defendant's aggregate prior record level "[i]f the offense was committed while the offender was on supervised or unsupervised probation[.]" N.C. Gen. Stat. § 15A-1340.14(b)(7) (2019). However, the "State must provide a defendant with written notice of its intent to prove the existence of the prior record point . . . as required by G.S. 15A-1340.16(a6)." N.C. Gen. Stat. § 15A-1340.14(b). Subsection 15A-1340.16(a6), in turn, requires that such notice be provided "at least 30 days before trial or the entry of a guilty or no contest plea." N.C. Gen. Stat. § 15A-1340.16(a6) (2019).

In this case, the trial court never determined whether the statutory requirements of N.C. Gen. Stat. § 15A-1340.16(a6) were met, and the State never provided notice of its intent to prove a prior record level point under N.C. Gen. Stat. § 15A-1340.14(b). *See* N.C. Gen. Stat. § 15A-1022.1(a) (2019) ("The court shall . . . determine whether the State has provided the notice to the defendant required by G.S. 15A-1340.16(a6) or whether the defendant has waived his or her right to such notice."). Nor does the State posit that defendant waived his right to receive such notice. *See id.*; *see also* N.C. Gen. Stat. § 15A-1340.16(a6) ("A defendant may waive the right to receive such notice."). Accordingly, the trial court erred by including the extra (sixth) point in sentencing defendant as a level three.[1] *State v. Snelling*, 231 N.C. App. 676, 682, 752 S.E.2d 739, 744

1. We note that defendant "is not bound by a stipulation as to any conclusion of law that is required to be made for the purpose of calculating" his prior record level. *State v. Gardner*, 225 N.C. App. 161, 167, 736 S.E.2d 826, 830 (2013) (citations omitted). The "trial court's assignment of defendant's prior record level is a question of law." *Id.* at 225 N.C. App. at 167, 736 S.E.2d at 830-31 (citations omitted).

(2014) (remanding for resentencing under analogous circumstances). This error was prejudicial as it raised defendant's prior record level from a two to a three. *See id.* We therefore remand this matter to the trial court for resentencing defendant at prior record level two under the felony sentencing guidelines.

III. Conclusion

Because we have determined that the trial court did not commit plain error by denying defendant's motion to suppress, we affirm the trial court's ruling on suppression. However, the matter is remanded to the lower court for resentencing for the reasons discussed herein.

NO ERROR; REMANDED FOR RESENTENCING.

Chief Judge McGEE and Judge ZACHARY concur.

STATE OF NORTH CAROLINA
v.
STERLING JAMAR DILWORTH

No. COA20-179

Filed 20 October 2020

Criminal Law—jury instructions—self-defense—defense of habitation

In a case involving assault with a deadly weapon inflicting serious injury, the trial court did not err by denying defendant's request to instruct the jury on defense of habitation. There was no evidence the victim had unlawfully entered defendant's home or its curtilage, the physical evidence showed defendant assaulted the victim outside the boundaries of his property, and, although he testified that he "felt like" the victim was on his property, defendant admitted he did not know the location of his property lines.

Appeal by Defendant from Judgment entered 21 March 2019 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 8 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas H. Moore, for the State.

Assistant Public Defender Brendan O'Donnell and Public Defender Jennifer Harjo for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Sterling Jamar Dilworth (Defendant) appeals from a Judgment entered 21 March 2019 upon a jury verdict finding him guilty of Assault with a Deadly Weapon Inflicting Serious Injury. The Record before us, including evidence presented at trial, tends to show the following:

Travis Moses (Moses) and Ellsworth Jessup (Jessup) had been neighbors and had known each other since Moses was young. Moses owned an all-terrain vehicle (ATV), and Jessup granted Moses permission to ride the ATV on Jessup's approximately thirty acres of property. Jessup cleared several trails throughout the property for Moses's use. Jessup's sister owned the parcel of property adjacent to Jessup's land, on which Defendant resided.

Around 8:10 p.m. on the evening of 29 March 2018, Moses was riding his ATV along Jessup's property. As he was riding his ATV, Moses stopped to send several text messages to a friend. Suddenly and without warning, an individual later identified as Defendant began attacking Moses with a steak knife. During the attack, Defendant repeatedly screamed "I don't know who you are." Defendant briefly paused his attack when Moses identified himself and informed Defendant that Jessup granted him permission to ride on the property. However, Defendant renewed his attack when Moses got off his ATV. After being stabbed multiple times, including in and around his neck and eye, Moses made his way back onto his ATV and drove it directly home, where his wife subsequently called 911.

Deputy A.J. Hatfield (Deputy Hatfield) of the Forsyth County Sheriff's Office responded to Moses's residence after dispatch reported a suspected stabbing. Deputy Hatfield found Moses in his garage with his wife, Jessup, and another man. Deputy Hatfield observed "a tremendous amount of blood spatter on the ground, surrounding [Moses's] body [and] also all over his body." Moses described the attack to Deputy Hatfield before being transported via ambulance to Wake Forest Baptist Hospital in Winston Salem, North Carolina. Deputy Hatfield also spoke with Jessup, who gave him directions to Defendant's house since he was identified as the most likely suspect.

Investigator James Ray, also of the Forsyth County Sheriff's Office, met Moses at the Wake Forest Baptist Hospital Emergency Room.

Moses again described the attack to Investigator Ray and provided him with the suspected location where there would likely be blood spatter and tracks from Moses's ATV. Investigator Ray testified through their conversation, Moses "was able to draw [him] a map of how he got on the land and provide a description of the most likely location of the crime scene." Moses then underwent surgery to repair damage to his eye caused by the stabbing. Before leaving the hospital to join the investigation, Investigator Ray called Deputy Hatfield to relay the suspected the location of the attack.

Investigator Ray arrived at Moses's residence soon after and assisted Deputy Hatfield in his search to determine where Moses was attacked. Investigator Ray and Deputy Hatfield located tire tracks and blood spatter on Jessup's property an estimated 200 to 250 feet from Defendant's trailer, which Investigator Ray testified was consistent with Moses's description. As Deputy Hatfield examined the ground and surrounding area, an individual, later identified as Defendant, approached Deputy Hatfield and Investigator Ray with his driver's license. Deputy Hatfield testified he asked Defendant if he knew why he was there, to which Defendant responded he had been in an altercation earlier.

Investigator Ray took over interviewing Defendant. Defendant told Investigator Ray he heard loud noises earlier that night and stepped outside to see what was going on. Then, Defendant continued, he heard music and saw Moses driving the ATV on his property. Defendant described approaching Moses from behind and stabbing him with the steak knife. During their conversation, Defendant identified to Investigator Ray the area of the attack, which Investigator Ray later confirmed with geodata to be outside Defendant's property line.[1] Investigator Ray asked Defendant where his property lines were but stated Defendant "wasn't able to identify exactly where his property lines were." Defendant accompanied Investigator Ray to the Forsyth County Sheriff's Office where Defendant provided a written statement.

On 2 July 2018, and again on 7 January 2019, Defendant was indicted for Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury. On 10 May 2018, Defendant noticed his intent to put forth the affirmative defense of self-defense. Defendant's case came on for trial on 19 March 2019. At trial, Defendant testified in his defense. Defendant testified on the evening of 29 March 2018 he heard noises from the back of his house. Defendant went to his porch and saw an ATV "creeping

1. Investigator Ray testified the officers used geodata maps, which were obtained from public record websites and showed the parcels of land.

alongside [his] house." Defendant described the ATV as traveling very slowly along a "little hill" in close proximity to his house. When defense counsel asked Defendant, "So, what, about 10 feet, 15?" Defendant answered: "Somewhere along those lines."

Defendant then recounted the attack, testifying he felt threatened for his safety. Defendant grabbed a steak knife from his cabinet, and, because the ATV had stopped, Defendant approached Moses screaming "I don't know you" and stabbing him repeatedly. Once Moses eventually identified himself and told Defendant he had permission from Jessup to ride on his property, Defendant testified he "backed off of him." However, when Moses got off of his ATV and took off his shirt, Defendant stated he again felt threatened and "that's when [he] really got to him. That's when it came to his eye and neck region, and things of that nature." Defendant reiterated his purpose in the attack was to get an intruder off his premises. On cross-examination, Defendant testified prior to the attack he smelled burning vegetation and heard gunshots. Defendant conceded, however, he did not mention either the smell of burning vegetation or gunshots to investigators the night of the attack or in his written statement. Defendant also corroborated Investigator Ray's testimony, stating: "Well, I mean, like I told the investigator, I'm not aware of the property line or nothing like that. I felt like all of that land there was -- belong to us."

During the charge conference, Defendant requested the trial court instruct the jury on the affirmative defenses of self-defense, according to North Carolina Pattern Jury Instructions 308.10 and 308.45, and defense of habitation, in accordance with Pattern Jury Instruction 308.80. The trial court determined Defendant was not entitled to any instruction on self-defense or defense of habitation. In declining Defendant's requested instruction on defense of habitation, the trial court reasoned:

> [W]here the prosecuting witness is operating the all-terrain vehicle was not within the curtilage of the home. The home is not enclosed by a fence, and the -- additionally, as the Court previously said, the use of that property would not be such that it would be the immediate land or area to the home where there would be intimate living space.

The trial court also emphasized "[Defendant] has also testified he didn't even know where his property line was[.]"

The trial court instructed the jury on the charge of Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury and, in accordance with Defendant's request, the lesser-included offenses of Assault

with a Deadly Weapon with Intent to Kill and Assault with a Deadly Weapon Inflicting Serious Injury. The jury returned a verdict finding Defendant guilty of the lesser-included offense of Assault with a Deadly Weapon Inflicting Serious Injury. Defendant stipulated to a prior record level of V, and the trial court sentenced him to an active sentence of 44 to 65 months. Defendant gave oral Notice of Appeal at the conclusion of his sentencing.

Issue

The sole issue on appeal is whether the trial court erred when it declined to instruct the jury on Defendant's requested instruction on the defense of habitation.

Analysis

I. Standard of Review

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citation omitted). Thus, "[w]here competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case . . . ." *State v. Lee*, 370 N.C. 671, 674, 811 S.E.2d 563, 566 (2018) (citation and quotation marks omitted). We review challenges to the trial court's decisions regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "However, an error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (citation and quotation marks omitted).

II. Defense of Habitation

In the present case, Defendant contends the trial court erred in denying his request for an instruction on defense of habitation because the evidence, taken in the light most favorable to Defendant, reflects he was asserting his right to defend his home against unlawful intrusion. North Carolina has long recognized this right—known at common law as the "castle doctrine." *See State v. Kuhns*, 260 N.C. App. 281, 284,

817 S.E.2d 828, 830 (2018). Most recently amended by our legislature in 2011, North Carolina's defense of habitation statute provides:

> (b) The lawful occupant of a home . . . is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if *both* of the following apply:
>
> (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.
>
> (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

N.C. Gen. Stat. § 14-51.2(b) (2019) (emphasis added); *see* An Act to Provide When a Person May Use Defensive Force and to Amend Various Laws Regarding the Right to Own, Possess, or Carry a Firearm in North Carolina, 2011 N.C. Sess. Laws 268, §1.

"Home" is defined "to include its curtilage," N.C. Gen. Stat. § 14-51.2(a)(1), and our courts have consistently defined curtilage to "include[ ] the yard around the dwelling and the area occupied by barns, cribs, and other outbuildings." *State v. Blue*, 356 N.C. 79, 86, 565 S.E.2d 133, 138 (2002) (citing *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955)). "[A] rebuttable presumption arises that the lawful occupant of a home, motor vehicle, or workplace reasonably fears imminent death or serious bodily harm when using deadly force at those locations under the circumstances in N.C. [Gen. Stat.] § 14-51.2(b)." *Lee*, 370 N.C. at 675, 811 S.E.2d at 566. Moreover, "a person does not have a duty to retreat, but may stand his [or her] ground." *Id.* (footnote omitted).

Defendant contends the evidence, construed in his favor, is sufficient to support such instruction because Defendant believed Moses to be unlawfully on his property at the time of the attack.[2] There is no

2. In support of his argument, Defendant cites this Court's decision in *Kuhns*, 260 N.C. App. at 283-85, 817 S.E.2d at 830-32, and our Supreme Court's recent decision in

question Defendant was the lawful occupant of his home. Nevertheless, to be entitled to the presumption articulated in Section 14-51.2(b), the statute expressly provides a defendant must meet *both* of the requirements set out in Subsections (1) and (2). N.C. Gen. Stat. § 14-51.2(b). Subsection 1 then mandates "[t]he person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home[.]" *Id.* § 14-51.2(b)(1). Accordingly, to qualify for the instruction on defense of habitation Moses must have been "in the process of unlawfully and forcefully entering," or "had unlawfully and forcefully entered" Defendant's home, which on the facts of the present case would be via the curtilage. *Id.*

The question is, therefore, if there is sufficient evidence, construed in Defendant's favor, supporting Defendant's contention Moses was unlawfully on or had been on Defendant's property and was within the curtilage of Defendant's property on the evening of the attack to warrant the defense of habitation instruction. We conclude, as did the trial court, there is not. Defendant testified in his defense that on the night of 29 October 2018, he saw Moses "creeping along this little hill going very slowly" in "very close proximity of [his] household." Defense counsel inquired, "So, what, about 10 feet, 15?" and Defendant answered, "Somewhere along those lines." On cross-examination, however, Defendant emphasized: "I mean, like I told the investigator, I'm not aware of the property line or nothing like that. I felt like all of that land there was -- belong to us."

Defendant presented no actual evidence Moses was in the process of or had actually unlawfully and forcibly entered his home. Instead, the Record and evidence in this case reflects when Moses stopped on his ATV, he was outside the bounds of Defendant's property and around 200-250 feet away from Defendant's residence. Specifically: Investigator Rector and Deputy Hatfield both testified to the location of the blood spatter and ATV track marks on Jessup's property. Moses's own testimony stated he was riding his ATV along Jessup's property when Defendant attacked, and Moses's description of the attack was corroborated by

---

State v. Coley, 375 N.C. 156, ___, ___ S.E.2d ___, ___ (filed 14 Aug. 2020) (No. 2A19). However, in both *Coley* and *Kuhns*, there was no question at the time of the respective incidents the defendants used defensive force against another who was actually in their home or curtilage. *Coley*, 375 N.C. at ___, ___ S.E.2d at ___ (slip op. at 2-3) (describing three separate entries into the defendant's home prior to the defendant's use of force); *Kuhns*, 260 N.C. App. at 287, 817 S.E.2d at 832 ("[T]he State conced[ed] that [decedent] was 'standing beside the porch on the ground, *within the curtilage*' of defendant's property when defendant fired the fatal shot." (emphasis added)). Thus, we conclude both cases are factually distinguishable and do not control our analysis.

Investigator Ray and, further, actually assisted the investigators in locating the blood spatter and ATV tracks. Investigator Rector also testified to his conversation with Defendant on the night of 28 March 2018, where Defendant informed him the attack occurred behind his parked cars, and two to three feet beyond some bushes, which was also outside the bounds of Defendant's property. Furthermore, the extent of Defendant's own testimony was that he "*felt like*" Defendant was on his property, but that he did not know the location of his property lines.

Thus, even if the evidence could support a determination Moses "had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred" under Section 14-51.2(b)(2), there is simply no evidence Moses was in fact "in the process of unlawfully and forcefully entering, or had unlawfully and forcefully entered, a home[.]" N.C. Gen. Stat. § 14-51.2(b)(1). Therefore, the trial court did not err in declining to instruct the jury on Defendant's requested instruction of defense of habitation. Because we conclude the trial court did not err, we do not reach Defendant's argument he was prejudiced by the denial of an instruction on defense of habitation.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial.

NO ERROR.

Chief Judge McGEE and Judge DIETZ concur.

STATE v. FAROOK

[274 N.C. App. 65 (2020)]

STATE OF NORTH CAROLINA
v.
KHALIL ABDUL FAROOK

No. COA19-444

Filed 20 October 2020

Constitutional Law—right to speedy trial—Barker factors—State's burden to explain delay—reliance on privileged information

Defendant's constitutional right to a speedy trial was violated pursuant to the factors in *Barker v. Wingo*, 407 U.S. 514 (1972), where there was a six-year delay between his arrest and his trial and the State failed to meet its burden to provide a valid reason for the delay, relying solely on testimony from defendant's former counsel in the case, the admission of which constituted plain error because it consisted of privileged attorney-client communications. The trial court's order denying defendant's motion to dismiss based on the constitutional violation—which failed to recognize that the lengthy delay created a presumption of prejudice to defendant, failed to shift the burden to the State, and erroneously ascribed the prejudicial effect of the delay to the State, not to defendant—was reversed, and defendant's judgment for felony hit and run resulting in serious injury or death and two counts of second-degree murder was vacated.

Appeal by defendant from judgments entered on or about 10 October 2018 by Judge Anna M. Wagoner in Superior Court, Rowan County. Heard in the Court of Appeals 4 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Sarah Holladay, for defendant-appellant.

STROUD, Judge.

Defendant appeals the trial court's denial of his motions to dismiss his case for violation of his Sixth Amendment right to a speedy trial. Because the State failed to carry its burden of proof as to the reason for delay in defendant's trial and as defendant has demonstrated prejudice from this delay, defendant's right to a speedy trial was violated, and thus

we reverse the order denying defendant's motion to dismiss and vacate defendant's judgment.

I. Background

The State's evidence showed that on 17 June 2012, defendant was driving when his vehicle collided with Mr. and Mrs. Jones, who were riding a motorcycle; both died from the collision. A blood sample was taken from defendant and submitted to the North Carolina State Crime Laboratory ("Crime Lab") for analysis on 28 June 2012. On 18 June 2012, warrants were issued for defendant's arrest on charges of felony hit and run resulting in death, driving while impaired, and resisting a public officer. On 19 June 2012, all three of the 18 June 2012 warrants were served and additional warrants were issued and served for two counts of felony death by vehicle. On 25 June 2012, pursuant to a search warrant seeking evidence for purposes of "D.N.A. collection, latent prints, trace evidence, document in the vehicle to show ownership" and evidence to assist in the "identification of the occupants[,]" law enforcement seized various items of evidence from defendant's vehicle, including swabs from various locations, the driver seat cushion, and a broken watch face. The samples were placed into "Temporary Evidence[.]"

On 2 July 2012, defendant was indicted for driving while impaired, resisting public officer, and two counts of felony death by vehicle. On 30 July 2012, defendant was indicted for reckless driving to endanger, driving left of center, driving while license revoked, and felony hit and run resulting in two deaths. Defendant remained in jail awaiting trial from the date he was arrested, 19 June 2012.[1]

On 11 July 2012, Mr. James Randolph was appointed as defendant's counsel. On 10 December 2014, Mr. James Davis was assigned to defendant's case replacing Mr. Randolph. According to the trial court's findings of fact, on 25 March 2015, "[b]lood alcohol results [were] sent from State Crime Lab to District Attorney's Office." The blood sample was analyzed "to determine the alcohol concentration or presence of an impairing substance therein[;]" on 1 June 2015, the Crime Lab prepared the report, which did not state a blood alcohol level and was negative for all other substance tests. On 26 March 2015-- nearly three years after defendant's arrest -- a "[r]ush request [was] sent from Brandy Cook for

1. On defendant's judgment for second degree murder and attaining the status of violent habitual felon he was "given credit for 2304 days spent in confinement prior to the date of this Judgment[,]" approximately six and one-third years.

expedited testing of DNA[,]" and on 17 April 2015, the "DNA analysis [was] completed."[2]

On 30 June 2017, Mr. Davis moved to withdraw from defendant's case. In the motion to withdraw, Mr. Davis alleged that "[a]fter extensive review and numerous conferences with Defendant, he had elected this month to proceed to trial." Mr. Davis further alleged that he "has a large criminal and civil trial practice, both in and out of county and in state and federal court[,]" including "a civil marital tort jury trial currently set the week of September 25, 2017, in Stanly County, NC[;]" a "civil wrongful death jury trial tentatively set for October 23, 2017, in Davie County[;]" "four pending custody trials, a DWI trial, and many other district court trials[;]" "a capital murder trial on January 8, 2018 . . . anticipated to last four to five months[,]" along with eight mediations and one deposition in the next two months. Mr. Davis noted that under the "scheduling order" defendant had a deadline of 6 October 2017 to file motions and notices and that "the Special Prosecutor intends to calendar the trial of Defendant's cases during the latter part of 2017 or early 2018."

On 5 July 2017, Mr. Aaron Berlin and Ms. Sarah Garner, "Special Prosecutors from the North Carolina Conference of District Attorneys" eventually became the State's attorneys on this case. On 5 July 2017, defendant rejected a plea offer by the State for "RECKLESS DRIVING TO ENDANGER, FEL HIT/RUN SER INJ/DEATH, DWI, FELONY DEATH BY VHIECLE X 2, DWLR, DRIVE LEFT OF CENTER[.]" This same day, Mr. Davis's motion to withdraw as defendant's counsel was granted and Mr. David Bingham was appointed in his stead, and defendant's cases were calendared for an "administrative hearing" on 7 August 2017.

On 17 July 2017, defendant was indicted for two counts of second-degree murder and attaining the status of violent habitual felon. On 2 August 2017, defendant wrote to his attorney, Mr. Bingham, and requested he withdraw from the case. Defendant stated that his understanding was that "you are my brother-in-law['s] attorney, and have been for years. . . . This will be a conflict of interest." Defendant requested that Mr. Bingham "ask one of these attorney[s] to take my case[,]" and listed three names. Defendant wrote, "My reason I ask this is because, Mrs. Anna Mills Wagoner the Resident Judge. She ask Mr. James Davis why didn[']t he ask other attorney before he put in his withdraw from my case." On 7 September 2017, defendant sent a note to the clerk of court noting he had mailed a motion to dismiss his court-appointed

2. District Attorney Brandy Cook was handling defendant's case in 2015.

attorney, Mr. David Bingham; on 11 September 2017, the letter requesting Mr. David Bingham be dismissed was filed. On 13 September 2017, Mr. David Bingham filed a motion to be removed from the case. On 14 September 2017, Mr. Bingham filed a motion for appointment of expert and asking for appointment of an investigator to interview witnesses to the incident and to "help him locate and establish alibi witnesses." On 25 September 2017, the trial court appointed Mr. Chris Sease as defendant's counsel. On 28 September 2017, Special Prosecutor Garner filed and served upon defendant's counsel a "Motion for Reciprocal Discovery and Defenses[,]" (original in all caps), pursuant to North Carolina General Statute § 15A-905 and a "Discovery Disclosure Certificate, 15A-957 Notice, Request for and Consent to Reciprocal Discovery[.]"

On 2 October 2017, the trial court entered an order establishing dates for filing and hearing motions; all defense motions were to be filed by 4 December 2017 and motions were to be heard on 27 January 2018. On 22 January 2018, Mr. Sease and Special Prosecutor Garner entered a consent agreement noting that defendant had "no pre-trial motions" and no reciprocal discovery to provide, while the State had "provided full discovery to the defendant" and afforded defendant's attorney "the opportunity to review in person the State's complete file[.]" The defendant also stipulated that "defendant uses the name Khalil Farook and was previously known as Donald Miller[.]"

On 19 March 2018, defendant sent the clerk of court a request for "information[] (motions) concerning my tr[ia]l delay for the years of 2013, 2014, 2015, 2016, 2017. That the District Attorney office file to delay my tr[ia]l. I need cop[ies] of each year." (Original in all caps.) A notation in different handwriting, apparently as the response from the Clerk's office, appears at the bottom: "There are no written motions in any of your files."[3] On 7 August 2018, the State filed a notice of expert witness, identifying Trooper D.H. Deal as an expert in "Crash/Accident Reconstruction" and noting the trial was set for the week of 24 September 2018. On 9 August 2018, the State dismissed the charges for reckless driving to endanger, driving left of center, DWI, resisting a public officer, and both counts of felony death.

On 6 September 2018, defendant filed a *pro se* motion requesting his case be dismissed "on the grounds that the defendant, . . . was deprived of effective assistance of counsel, and on flagrant violation of the Constitution of the United States and North Carolina, Amendment VI,

3. According to the record, the notation was correct, as no written motions had been filed regarding defendant's trial delay.

VIII." (Original in all caps.) Defendant alleged that his appointed attorney, Mr. James Davis, did not speak to him until 57 months after he was appointed.[4] Defendant also alleged he never agreed to any delays in his trial and that he had been prejudiced both by his ineffective counsel and the delay. On 13 September 2018, defendant filed another *pro se* motion similar to his motion a week earlier but also added that his former counsel, Mr. David Bingham had also been ineffective.

On 18 September 2018, defendant's attorney, Mr. Chris Sease, filed a motion to dismiss defendant's case due to the violation of his constitutional rights to a speedy trial.[5] The motion to dismiss alleged, although the incident was on 17 June 2012, defendant was not charged or served with indictments for second degree murder, violent habitual felon, and habitual felon until 5 July 2017. Mr. Sease alleged that since defendant was incarcerated in the Rowan County Detention Center, he was easily accessible to the charging officer and District Attorney's Office and any failure to serve warrants on defendant was "through no fault of [defendant's] own." The motion also alleged defendant believed the warrants were "purposely held until after []he had rejected the State's plea officer and after his original counsel of record had withdrawn from this case, in an attempt to oppress, harass and punish him further." The motion to dismiss also noted when events occurred which we summarize in a timeline:

31 July, 2012	Indictment.
6 August 2012[6]	Case was calendared for this week but Mr. Randolph, counsel, withdrew.
8 August 2012	Mr. Davis appointed as counsel.

4. It is not clear how defendant calculated 57 months. Mr. Randolph, defendant's attorney, was appointed in July of 2012 and replaced by Mr. Davis in August of 2012, according to defendant's motion. Mr. Davis withdrew in July of 2017, approximately 59 months after his appointment. Mr. Davis' testimony indicates he did not have much interaction with defendant but had sent staff or other attorneys from his office to visit defendant. In any event, the general import of defendant's motion is clear.

5. In defendant's motion to dismiss he based his argument on North Carolina General Statute § 15A-954(a)(3), "the Sixth Amendment to the Constitution of the United States of America, and Section Eighteen of Article I of the North Carolina Constitution." But on appeal defendant does not address his statutory argument; in fact, according to defendant's brief's table of contents, he does not even cite N.C. Gen. Stat. § 15A-954. Therefore, we address defendant's argument only as constitutional violations.

6. 6 August 2012 is the date alleged in defendant's motion but the "ORDER OF ASSIGNMENT OR DENIAL OF COUNSEL" signed by the trial judge is dated 10 December 2014. There are discrepancies in the record, which may be clerical errors, regarding dates

13 August 2012	Defendant entered not guilty plea.
18 February 2013	Defendant's case was calendared but not reached.
19 March 2013	Defendant's case was calendared but not reached.
16 April 2013	Defendant's case was calendared. New assistant district attorney was assigned to the case.
15 July 2015	Defendant's case was calendared but not reached.
13 February 2017	Defendant's case was calendared but not reached. Assistant District Attorney was released from the case, and it was assigned to the Conference of District Attorneys.
5 July 2017	Defendant was indicted for second degree murder, habitual felon, and violent habitual felon. Defendant's case was calendared for the week and not reached. Mr. Bingham was appointed as defendant's counsel and Mr. Sease was appointed to aid Mr. Bingham in going through discovery.
29 August 2017	Defendant's case was calendared but not reached.
26 September 2017	Defendant's case was calendared and not reached. Mr. Bingham withdrew and Mr. Sease became defendant's attorney.
8 January 2018	Defendant's case was calendared but not reached. A tentative trial date was set for September 2018.

The speedy trial motion alleged due to the extensive delay defendant was "prejudiced by an inability to adequately assist his defense attorney" in preparing for trial and by the second degree murder charges brought by the State long after the offense date: "Had his case been resolved in the years of 2012 through 2017 it is arguable that he would have never been charged with Second Degree Murder."

---

of appointment of defendant's attorneys. The dates shown by the actual orders appointing the attorneys are: by order signed 11 July 2012 – Mr. James Randolph was appointed; by order signed 10 December 2014, Mr. James Davis was appointed explicitly to replace Mr. Randolph; by order signed 5 July 2017, Mr. David Bingham was appointed; and by order dated 25 September 2017, Mr. Chris Sease was appointed. However, the "Case Events Inquiry" shows a "defense attorney name/type" change from James Randolph to James Davis on 8 August 2012. (Original in all caps.) It seems most likely Mr. Davis began representing defendant in 2012, despite the December 2014 order of appointment.

The State filed a brief with the trial court opposing the motion. Because the State's brief in opposition to the motion and the trial court's order are essentially identical, we will not separately address the State's contentions in its trial brief. A hearing was held regarding the alleged speedy trial violation on 24 September 2018, and on 8 October 2018, the trial court entered an order denying defendant's motion to dismiss. The order on appeal is almost entirely a verbatim copy of the State's "Brief in Opposition to Defendant's Motion to Dismiss." (Original in all caps.) The *only* obvious differences between the State's brief and the order are the headings, transitions between the various sections, and the closing and signatures. In addition, much of the State's brief was not based on the court file or calendars but instead upon information provided by Mr. Davis, defendant's second attorney. For example, the State's brief, and thus the order, notes 13 March 2014 as a date when "Attorney from Davis office met with defendant" and that "James Davis retained our original court dockets from that session and does not have record of Defendant on any calendars[;]" this information is not in the documents from the court file in our record, and information regarding a defense attorney's visits with his client and office records would *not* be in the court file so it appears Mr. Davis must have provided this information to the State prior to the hearing for use in its brief which would ultimately become the order.

The next section of the State's Brief is entitled "ARGUMENT[;];" the corresponding section of the Order is entitled "FINDINGS[.]" The *only* difference between the "argument" and the "findings" is that the order omits the first sentence of the State's brief which states, "For the foregoing reasons, the State respectfully moves this Court to deny Defendant's motion to dismiss based on a speedy trial violation." We also note that despite the title, this portion of the order includes some findings of fact but also extensively quotes cases addressing Sixth Amendment law; since the "findings" portion of the order is actually the "argument" portion of the State's brief, it naturally presents the State's legal argument and citation of cases. The actual findings of fact regarding the timeline of events are stated in the "TIMELINE" portion of the order.

Two sentences of the findings address "exhibit 1" regarding the State's "extensive backlog of . . . cases."[7] In the transcript, only two

7. The "FINDINGS" are not numbered but are paragraphs of text, just as in the State's brief. These sentences are: "In the instant case, the State had an extensive backlog in Superior Court cases. From the week of July 2nd, 2012 through June 27th, 2016 the State tried mostly cases older than Defendant's case (see attached exhibit 1.)." Exhibit 1 was not attached to the order in our record.

exhibits are noted on the "EXHIBITS" page as identified for the hearing regarding defendant's speedy trial motion: For the State, Exhibit "A," described in the transcript as "State's brief" and for defendant, Exhibit "1" described in the transcript as defendant's "ACIS printout, court dates[.]" In the body of the transcript, the State introduced ""Exhibit A"[8] and states,

> I would also introduce Exhibit A . . .
>
> . . . .
>
> I filed a brief in response to this involvement, which I've attached all -- Exhibit A, all of the cases that I've -- that are discussed in my brief as well as the timeline of -- of what Mr. Davis has discussed. I would also just ask the Court to take judicial notice of all of the motions and dates that were indicated in the Court file as well, which I'll discuss later.
>
> (State's Exhibit No. A was admitted.)

Before the trial court, the State's argument regarding Exhibit A was:

> I had introduced Exhibit A to talk about the backlog -- which shows the backlog that was in Superior Court at that time, but also to show how efficient and effective the State was at the time of making sure trials were being scheduled and heard. Mr. Davis also corroborated that during his testimony as well.

In response to the State's Exhibit A, defendant's counsel asked the trial court to take judicial notice of "Defendant's Exhibit No. 1[,]" which he described:

> This is the ACIS printout –
>
> . . . .
>
> that was given to me by the clerk's office in preparation for this motion. And it -- it details every court date that has

8. According to the text of the brief, the State's brief included an "attached exhibit 1" regarding the State's "extensive backlog in Superior Court cases." However, no exhibit was attached to the State's brief which appears in our record. At the hearing, it appears that the "exhibit 1" from the State's brief was identified as State's Exhibit A. We will refer to this exhibit as State's Exhibit A, as identified before the trial court.

entered into ACIS by the clerk's office.[9] So as a matter of an attempt to -- I call like, the term "save face," as to why these dates are a little bit in dispute.

The dates that I'm using in my motion are from that instead of the other dates. I mean, obviously, Mr. Davis kept meticulous notes in docketing to verify when it was actually calendared, so that's I thought -- I wanted to make sure I substantiated what dates I'm using.

(Defendant's Exhibit No. 1 was identified.)

THE COURT: Okay. So you[] are referring not -- not placed on the actual calendars, but on the --

MR. SEASE: Correct.

THE COURT: -- print out from the clerk's office?

MR. SEASE: From experience, if I went to the extent of going through each and every calendar to prepare this motion, I would not, for one, be compensated in time by IDS; two, I didn't have the time in my regular practice to do that at this time.

The State's brief on appeal does not address a single time defendant's case was actually calendared nor does it mention State's Exhibit A or attempt to explain how it would support its argument.[10] State's Exhibit A is *not* a copy of court dockets or calendars showing cases scheduled and heard but simply a listing of weeks of court noting one or more cases tried that week. There is no indication of how long any individual case took to be tried or how many other cases were on the calendar for the week which were not reached. For example, these are the entries for two weeks:

---

9. As noted, this exhibit, the "CASE EVENTS INQUIRY" printout, shows one of the discrepancies in dates regarding defendant's counsel. It provides:

08/08/12 . . . DEFENSE ATTORNEY NAME/TYPE CHANGE
FROM: RANDOLPH, JAMES DKF
TO: DAVIS, JAMES

However, the actual "Order of Assignment or Denial of Counsel" in our record states "James Davis to replace James Randolph" and was signed on 10 December 2014. Mr. Randolph was originally appointed by order signed on 11 July 2012.

10. The State's brief failed to address either State's Exhibit A or defendant's Exhibit 1.

SUPERIOR COURT WEEK OF MARCH 31, 2014

Jury trials: Tia Livengood (2010 felony embezzlement) and William Kennedy (2012 felony habitual DWI).

SUPERIOR COURT WEEK OF APRIL 7, 2014

Jury trials: Curtis Parrigden (2009 felony possession stolen goods) and Darryl Wright (2008 misdemeanor).

State's Exhibit A lists dates from 2 July 2012 to 27 June 2016 and notes jury trials, administrative weeks, and some days when no judge was available. Some of the weeks omitted are presumably holidays, such as the last week or two of December. For many months, only two weeks of the month are addressed. State's Exhibit A does not explain why some other weeks are omitted, and the weeks listed end about two years prior to Defendant's 2018 trial. Thus, even if State's Exhibit A includes some information regarding the "backlog" of cases, it does not address the last two years of the alleged delay.

In its "findings[,]" the trial court acknowledges the length of delay before defendant's trial, but determines that the State's backlog and defendant's failure to assert his right sooner indicate there was no violation. The trial court actually determined that *the State* was "significantly prejudiced" by the delay caused by its own backlog. The last sections of the brief and the order are entitled "CONCLUSION." The brief concludes with the State's two-sentence request to deny defendant's motion to dismiss. The order concludes with its two-sentence conclusion of law and is the entirety of the trial court's conclusions "of law" section. The trial court concluded, "For the foregoing reasons, this Court finds Defendant's right to a speedy trial was not violated."

Finally, on 8 October 2018, defendant's trial began, and after a trial by jury, the jury found defendant guilty of felony hit and run resulting in serious injury or death, and two counts of second-degree murder. Defendant entered plea agreements for the charges driving while license revoked and attaining the status of violent habitual felon; the trial court entered judgment ultimately sentencing defendant to life without parole. Defendant appeals.[11]

---

11. Defendant provided oral notice of appeal from his judgments but did not file a written notice of appeal from the written order denying his motion to dismiss; neither the State nor defendant addressed this issue. Upon our own initiative we exercise our discretion to invoke Rule 2 of our Rules of Appellate Procedure to consider defendant's appeal regarding the order denying his motion to dismiss for a speedy trial violation in order "[t]o prevent manifest injustice to" him. N.C. R. App. P. 2 ("To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division

II. Right to a Speedy Trial

In June and July of 2012, defendant was indicted for driving while impaired, resisting a public officer, two counts of felony death by vehicle, reckless driving to endanger, driving left of center, driving while license revoked, and felony hit and run resulting in two deaths. Defendant's trial did not begin until 8 October 2018, over six years after defendant was indicted and arrested. Defendant first contends his Sixth Amendment right to a speedy trial under the United States Constitution and his Article I right to a speedy trial under the North Carolina Constitution has been violated, and thus the trial court erred in denying his motion to dismiss.

A. Standard of Review

"When reviewing speedy trial claims, we employ the same analysis under both the Sixth Amendment and Article I." *State v. Washington*, 192 N.C. App. 277, 282, 665 S.E.2d 799, 803 (2008). "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Wilkerson*, 257 N. C. App. 927, 929, 810 S.E.2d 389, 391 (2018) (citation and quotation marks omitted).

B. *Barker* Factors

We consider defendant's allegation of a speedy trial violation under the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101 (1972).

> The Supreme Court of the United States laid out a four-factor balancing test to determine whether a defendant's Sixth Amendment right to a speedy trial has been violated. *Barker*, 407 U.S. at 530, 92 S.Ct. at 2191–92, 33 L.Ed.2d at 116–17. These factors are: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and, (4) prejudice to the defendant. None of these factors are determinative; they must all be weighed and considered together:
>
> > We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related

---

may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.").

> factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the constitution.

Barker, 407 U.S. at 533, 92 S.Ct. 2182, 33 L.Ed.2d at 118–19.

Wilkerson at 929, 810 S.E.2d at 392 (citations, quotation marks, and brackets omitted). We thus turn to the *Barker* factors. *See id.*

1. Length of Delay

The delay in this case was over six years, clearly sufficient to create a presumption of prejudice to the defendant and to "trigger the *Barker* inquiry:"

> The length of the delay is not *per se* determinative of whether defendant has been deprived of his right to a speedy trial. No bright line exists to signify how much of a delay or wait is prejudicial, *but as wait times approach a year, a presumption of prejudice arises. Doggett v. United States*, 505 U.S. 647, 652 n.1, 112 S.Ct. 2686, 2690–91 n.1, 120 L.Ed.2d 520, 528 n.1 (1992). This presumptive prejudice does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* inquiry.

Id. at 930, 810 S.E.2d at 392 (emphasis added) (citation, quotation marks, and brackets omitted). The trial court's order acknowledges the length of time of the delay and the law regarding the presumption of prejudice but did not recognize the presumption of prejudice *to defendant* but instead turned to the other factors. The trial court also determined "the State has been significantly prejudiced by the length of the delay." We have been unable to find any prior case considering potential prejudice to the *State* from its own delay. The Sixth Amendment right to a speedy trial is a right granted to the *defendant*, not the State. *See* U.S. Const. amend. VI ("In all criminal prosecutions, *the accused* shall enjoy the right to a speedy and public trial[.]" (emphasis added)).

Six years is certainly a lengthy enough delay to create the "*prima facie* showing that the delay was caused by the negligence of the prosecutor." *Wilkerson* at 931, 810 S.E.2d at 393 ("This Court in *Chaplin* found a pre-trial delay of 1,055 days, with the case being calendared thirty-one times before being called, constituted a *prima facie* showing of prosecutorial negligence or willfulness. *Chaplin*, 122 N.C. App. at 664, 471 S.E.2d at 656. . . . This Court in *Strickland* concluded a delay of 940 days was enough to constitute a *prima facie* showing of prosecutorial negligence. *Strickland*, 153 N.C. App. at 586, 570 S.E.2d at 903."). Here, defendant's delay was over six years – over 2190 days -- and thus "a presumption of prejudice arises[,]" and this triggers the rest of the *Barker* inquiry. *Id*. at 930, 810 S.E.2d at 392.

2. Reason for Delay

Based upon the six-year delay, the burden of proof "to rebut and offer explanations for the delay" shifted to the State. *See id*. at 930, 810 S.E.2d at 392.

a. Burden of Proof of Reason for Delay

As noted above, the defendant carried his burden of showing that the "delay was particularly lengthy," as it was over six years. *Id*. at 930, 810 S.E.2d at 392. This delay creates a "*prima facie*" case that "the delay was caused by the negligence of the prosecutor[:]"

> Defendant bears the burden of showing the delay was the result of neglect or willfulness of the prosecution. *If a defendant proves that a delay was particularly lengthy, the defendant creates a prima facie showing that the delay was caused by the negligence of the prosecutor.*
>
> Once the defendant has made a *prima facie* showing of neglect or willfulness, *the burden shifts to the State to rebut and offer explanations for the delay*. The State is allowed good-faith delays which are reasonably necessary for the State to prepare and present its case, but is proscribed from purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort. Different reasons for delay are assigned different weights, but only valid reasons are weighed in favor of the State. *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192–93, 33 L.Ed.2d at 117.

Id. at 930-31, 810 S.E.2d at 392–93 (emphasis added and omitted) (citations, quotation marks, and brackets omitted).

We first note the trial court's order did not properly assign the shifted burden to the State. Instead, the trial court concluded *defendant* had the burden entirely and did not recognize that the six-year delay alone triggered "the burden shift[] to the State to rebut and offer explanations for the delay." *Id*. at 930, 810 S.E.2d at 392. Despite the trial court's order – which, as noted above, was a copy of the State's brief -- at the hearing, counsel for both defendant and the State recognized that the burden did shift to the State to present evidence regarding the reasons for the delay, and the State offered that evidence in the form of Mr. Davis's testimony. This brings us to one of defendant's other issues appeal, since the State presented evidence from only one witness regarding the reason for the delay: *defendant's* former attorney on this very case, Mr. Davis.

b. Testimony by Defendant's Former Counsel

Defendant argues that "WHERE THE DEFENDANT'S PRIOR ATTORNEY TESTIFIED AGAINST HIM AT THE HEARING ON THE SPEEDY TRIAL MOTION, THE TRIAL COURT PLAINLY ERRED IN ADMITTING PRIVILEGED[12] AND CONFIDENTIAL TESTIMONY[.]" The order states it was "based on the Court file and the sworn testimony of attorney James Davis on September 24, 2018 in open court[.]" Indeed, instead of presenting testimony from the clerk of court or an assistant district attorney regarding the court dockets and calendaring of defendant's case and other cases, the State relied upon testimony from defendant's former counsel. Mr. Davis testified generally about the court dockets but most of his testimony addressed his representation of defendant and his trial strategy; both of these subjects raise important questions of attorney-client privilege.[13]

We first note that according to the order appointing him as counsel, Mr. Davis was not appointed until 10 December 2014, over two years after defendant's arrest. But Mr. Davis testified that throughout 2013 part of his strategy was to give things time to "cool down."[14] Mr.

12. "A privilege exists if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege." *Berens v. Berens*, 247 N.C. App 12, 19, 785 S.E.2d 733, 739 (2016).

13. Mr. Davis never mentioned the specific word "backlog." Instead, the State relied on its Exhibit A. Before the trial court, the State noted: "I had introduced Exhibit A to talk about the backlog . . . . Mr. Davis also corroborated that during his testimony as well."

14. Again, as noted above, there is some uncertainty as to when Mr. Davis began representing defendant. Mr. Davis did not say anything about defendant's first attorney, other than noting he replaced him. Regardless of whether Mr. Davis was appointed in 2012 or 2014, our analysis would not change.

Davis noted that Assistant District Attorney Seth Banks had told him if defendant did not plead guilty to the initial charges, he would charge defendant as "violent habitual felon[,]" which the State later did. Mr. Davis also testified that the second-degree murder indictments were filed only after plea negotiations had failed. During cross examination, Mr. Davis also noted while he was defendant's counsel "at no time" had the case been on a trial calendar, only administrative calendars. No actual calendars, administrative or trial, were offered as evidence.

At the hearing, defendant was represented by a new court-appointed attorney, who did not object to Mr. Davis's testimony, and thus we review this issue for plain error. *See State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) ("[T]he North Carolina plain error standard of review applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

Id. at 518, 723 S.E.2d at 334 (citations and quotations marks).

This is an exceptional case and the issue of a violation of attorney-client privilege in this context is a fundamental error which "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* The attorney-client privilege is one of the most important and well-established protections our legal system affords a criminal defendant:

> The public's interest in protecting the attorney-client privilege is no trivial consideration, as this protection for confidential communications is one of the oldest and most revered in law. The privilege has its foundation in the common law and can be traced back to the sixteenth century. The attorney-client privilege is well-grounded in the jurisprudence of this State. When the relationship of attorney and client exists, all confidential communications made

by the client to his attorney on the faith of such relationship are privileged and may not be disclosed.

There are exceptions to this general rule of application to all communications between a client and his attorney . . . .

The rationale for having the attorney-client privilege is based upon the belief that only full and frank communications between attorney and client allow the attorney to provide the best counsel to his client. The privilege rests on the theory that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously—benefits out-weighing the risks of truth-finding posed by barring full disclosure in court.

In considering whether an attorney can be compelled to disclose confidential attorney-client communications, it is noteworthy that unlike other profession-related, privileged communications, the attorney-client privilege has not been statutorily codified. In article 7 of chapter 8 of our General Statutes, relating to competency of witnesses, the General Assembly has specifically addressed a method for disclosure of privileged communications. In N.C.G.S. § 8–53, the General Assembly has established the privilege for confidential communications between physician and patient, providing that confidential information obtained in such a relationship shall be furnished only on the authorization of the patient or, if deceased, the executor, administrator or next of kin of the patient. This statute further provides that any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to N.C.G.S. § 8–53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice. Our General Assembly has also provided this same disclosure procedure and basis in its creation of the privilege for communications between psychologist and patient (N.C.G.S. § 8–53.3 (2001)), in the school counselor privilege (N.C.G.S. § 8–53.4 (2001)), in the marital and family therapy privilege (N.C.G.S. § 8–53.5 (1999)), in the social worker privilege (N.C.G.S. § 8–53.7 (1999)), in the professional counselor privilege (N.C.G.S. § 8–53.8 (2001)), and in the optometrist-patient privilege (N.C.G.S. § 8–53.9 (2001)).

> With respect to statutorily established privileges, we also find it notable that with other types of privileged communications, such as the clergyman privilege, the General Assembly has made these in essence absolute by not including any provision for a judge to compel disclosure if in his opinion disclosure is necessary to a proper administration of justice. Significantly, our General Assembly has not seen fit to enact such statutory provisions for the attorney-client privilege, and we must look solely to the common law for its proper application.

In re Miller, 357 N.C. 316, 328–30, 584 S.E.2d 772, 782–83 (2003) (citations, quotation marks, and brackets omitted).

Both attorney-client privilege and work-product privilege apply to criminal prosecutions:

> Attorney-client communications are privileged under proper circumstances. A similar qualified privilege protects criminal defendants from disclosure of the work of attorneys produced on behalf of such defendants in connection with the investigation, preparation or defense of their cases. *Both the attorney-client privilege and the work product privilege, however, are privileges belonging to the defendant* and may be waived by him.

State v. Taylor, 327 N.C. 147, 152, 393 S.E.2d 801, 805 (1990) (emphasis added) (citations omitted).

Although there are exceptions to both the attorney-client privilege and work-product privilege, the State has not identified or argued that any particular exception to attorney-client privilege would apply to this case. Instead, the State responds to defendant's argument regarding violation of his attorney-client privilege by arguing that "defendant waived attorney client privilege and work . . . privilege with regard to trial strategy *when he acquiesced to the strategic delay in trial*." (Emphasis added.) (Original in all caps.) The State continues,

> [I]n the context of defendant's argument regarding a speedy trial violation, the material issue is not whether defendant and his counsel communicated about strategy. Rather, the material issue is whether or not defendant acquiesced in the delay. There is no evidence that this strategic decision was an attorney-client privileged communication. The actual employment of a trial strategy of delay does not itself constitute a communication from

> defendant such that it is afforded the protections of the attorney-client privilege. Rather, if anything, such strategy should be protected by the work product doctrine.

But the State has not argued any of the established exceptions or methods of waiver of the privilege.[15] The State cites no legal authority in support of its theory of Defendant's tacit waiver of attorney-client privilege by acquiescence to a "strategic delay in trial." The State's argument first *assumes* that defendant did in fact knowingly and intentionally acquiesce in Mr. Davis's "strategic decision" to delay trial, but it is the *State's* burden to prove this fact. The State's entire explanation of the six-year trial delay is that defendant had agreed to the delay. Since Mr. Davis did not personally meet with or talk to defendant until more than three years had passed since he was appointed, based upon the unrefuted facts, Mr. Davis could not have obtained Defendant's consent to a trial strategy of delay, nor could he have testified based upon any particular statement by defendant to him during that time period, although others from his office could have discussed these matters with defendant and communicated this to Mr. Davis. But this does not eliminate the issue of attorney-client privilege, which also extends to an attorney's agents. *See generally State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981) ("Communications between attorney and client generally are not privileged when made in the presence of a third person *who is not an agent* of either party." (emphasis added)).

And even if we assume *arguendo* that Mr. Davis's testimony regarding his "strategic decision" to let things "cool down" when he began representing defendant was not protected by attorney-client privilege, this would explain perhaps a year or two of the six-year delay; it does not address the majority of the delay. The State also has the burden to explain the additional four or five years.

The State also argues that Mr. Davis's "trial strategy" was not a protected communication but rather "work product." Although the work-product privilege normally applies to documents or other materials,

---

15. A defendant waives attorney-client privilege for purposes of a motion for ineffective assistance of counsel. *See generally State v. Taylor*, 327 N.C. 147, 152, 393 S.E.2d 801, 805 (1990) ("By alleging in his amended motion for appropriate relief that his court-appointed attorney, the Public Defender, rendered ineffective assistance of counsel during the trial and direct appeal of these cases, the defendant waived the benefits of both the attorney-client privilege and the work product privilege, but only with respect to matters relevant to his allegations of ineffective assistance of counsel."). Defendant filed a *pro se* motion alleging ineffective assistance of counsel, but his counsel did not file a motion for ineffective assistance of counsel, and the trial court did not consider defendant's *pro se* motions.

the essence of the privilege is protection of "an attorney's impressions, opinions, and conclusions or his legal theories and strategies[:]"

> The work product doctrine applies in criminal as well as civil cases. It is a qualified privilege for certain materials prepared by an attorney acting on behalf of his client in anticipation of litigation. The doctrine has been extended to protect materials prepared for the attorney by his agents as well as those prepared by the attorney himself.
>
> The doctrine was designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client's case. Only roughly and broadly speaking can a statement of a witness that is reduced verbatim to a writing or a recording by an attorney be considered work product, if at all. It is work product only in the sense that it was prepared by the attorney or his agent in anticipation of trial (in this case, by the police for the district attorney). Such a statement is not work product in the same sense that an attorney's impressions, opinions, and conclusions or his legal theories and strategies are work product.
>
> As pointed out in *United States v. Nobles*, *supra*, the work product privilege, like any other qualified privilege, can be waived. The privilege is certainly waived when the defendant or the State seeks at trial to make a testimonial use of the work product. By electing to use Fragiacomo as a witness the State waived any privilege it might have had with respect to matters covered in his testimony.

State v. Hardy, 293 N.C. 105, 126, 235 S.E.2d 828, 840–41 (1977) (citations omitted).

Even if we were to assume that defendant's former counsel's "impressions, conclusions, opinions and legal theories" regarding his defense of defendant could be considered "work product," those are privileged just as a document setting forth those processes in writing would be. *See North Carolina State Bar v. Harris*, 139 N.C. App. 822, 824–25, 535 S.E.2d 74, 76 (2000) ("[T]he attorney-work product rule, which is a qualified privilege for witness statements prepared at the request of the attorney and an almost absolute privilege for attorney notes taken during a witness interview. *Also*, *under the attorney-work product rule*, *the mental impressions*, *conclusions*, *opinions and legal theories of an attorney are absolutely protected from discovery regardless of any*

showing of need. North Carolina recognizes the attorney-work product rule under N.C. Gen. Stat. § 1A–1, Rule 26(b)(3) (1990). Under that statute, attorney-work product is defined in relevant part to include, among other things, materials prepared in anticipation of litigation or for trial by or for another party or by or for that other party's agent. Such evidence may be obtained by a party "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." (emphasis added) (citations, quotation marks, and ellipses omitted)).

Mr. Davis's communications with defendant and his trial strategy were protected by attorney-client privilege. *See generally in re Miller*, 357 N.C. at 328–30, 584 S.E.2d at 782–83. Even if portions of Mr. Davis's testimony regarding the court calendars in Rowan County or his other cases did not reveal privileged information, neither the State nor the trial court made any attempt to limit his testimony to this sort of public information. If the strategic trial decisions that the State contends defendant agreed to in consultation with his attorney are not protected, then it is difficult to fathom the communication or work product which *could* be protected. And even if Mr. Davis did have a trial strategy of delay, if he failed to communicate that strategy to defendant, defendant could not agree to it. To show defendant's knowing acquiescence to Mr. Davis's trial strategy – which is the basis of the State's waiver argument -- the State would have to show that defendant's counsel communicated his strategy to defendant, and he did actually agree.

The trial court thus erred in allowing Mr. Davis to testify against defendant where defendant had not waived his attorney-client privilege. To demonstrate plain error, defendant must also "establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

The State's *only* evidence to rebut the *prima facie* showing of a violation of defendant's right to a speedy trial was erroneously admitted in violation of his attorney-client privilege, and without this evidence, the State could not carry its burden of attempting to explain the trial delay and defendant's motion should have been allowed. We conclude the erroneous admission of the State's evidence had "a probable impact" on a jury finding defendant guilty as there would have been no trial without it, since defendant's case would have been dismissed for the speedy trial violation. We therefore conclude the trial court plainly erred in allowing Mr. Davis to testify against his former client. We will thus disregard the

entirety of Mr. Davis's testimony regarding his "trial strategy" of delay and any findings of fact based upon that testimony.

c. Evidence of Reasons for Delay

Turning back now to the State's asserted reasons for the delay, without Mr. Davis's testimony, the State has given no explanation or excuse for the delay. The State could have presented testimony regarding some of the information in Mr. Davis's testimony from the assistant district attorneys who dealt with the case and who discussed the case with Mr. Davis.[16] Even if we consider the evidence and information in the court file, this simply establishes the basic timeline of events and these facts were not in dispute. Defendant's case was not scheduled for trial by the State, and it was on an administrative calendar only a few times during the six years preceding trial. The State did not even *request* analysis of the DNA evidence until approximately three years after defendant was arrested. Otherwise, the State did not present any evidence regarding the reasons for the delay other than from defendant's former counsel. The State failed to meet its burden "to rebut and offer explanations for the delay." *Wilkerson*, 257 N.C. App. at 930, 810 S.E.2d at 392.

It is important at this point that we not speculate or move beyond the evidence we have before us. The burden here was on the State, and since we must disregard Mr. Davis's testimony given in violation of defendant's attorney-client privilege, the State failed to provide any explanation for years of the delay. This Court can only conclude that prong two, the reason for the delay, weighs against the State. It was the State's burden to explain the delay or produce admissible evidence the delay was due to defendant's own actions or caused by some other valid reason, but the State presented no such competent evidence and the court file does not show this occurred.

Even on appeal, apparently recognizing the absence of evidence in the record, the State discussed no details of its case backlog as a justification for the delay of defendant's case but instead argues in a footnote of its brief:

> [t]his Court has previously noted the existence of a backlog of cases and lack of available prosecutorial staff in Rowan County during this same time period in its recent

16. The State's brief and trial court's order also includes findings in the "timeline" regarding some dates of conversations or communications between Mr. Davis and several assistant district attorneys, although the State did not present any witnesses other than Mr. Davis.

> published opinion in State v. Farmer, ___ N.C. App. ___, ___, 822 S.E.2d 556, 560 (2018). In Farmer, this court found no speedy trial violation despite a delay of approximately five and a half years between the institution of charges and the trial.

This Court cannot rely upon factual findings in *Farmer* to review the trial court's order *in this case*; the State cannot carry its burden of production of factual evidence regarding the reasons for delay in this case only by citation to other cases, even from the same judicial district and during the same general time period. One obvious reason is the difference in the facts of each case. In *Farmer*, the trial court found, and this Court also determined, that although the backlog was a "primary cause" of the delay, the defendant had also contributed to the delay by requesting funds to obtain an expert witness, and he agreed to continue the case:

> Specifically, defendant contends that the State allowed his case to be idle while there were 77 administrative sessions and 78 trial sessions between 2012 and 2017. The State acknowledged that there was a considerable delay in calendaring defendant's case. However, *the State presented evidence of crowded dockets and earlier pending cases given priority as a valid justification for the delay*.
>
> According to the record, it is undisputed that the primary cause for defendant's delayed trial was due to a backlog of pending cases in Rowan County and a shortage of staff of assistant district attorneys to try cases. The State asserts that, at minimum, defendant also played a role in the delay as the record shows defendant was still preparing his trial defense as of late 2014 when he requested funds to obtain expert witnesses. Significantly, *defendant filed his motion for a speedy trial after he agreed to continue his case to the next trial session in 2017*. Thus, defendant himself acquiesced in the delay by waiting almost five years after indictment to assert a right to speedy trial.

State v. Farmer, 262 N.C. App. 619, 623, 822 S.E.2d 556, 560 (2018) (emphasis added).

Here, the State failed to present any meaningful evidence regarding the "crowded dockets and earlier pending cases given priority as a valid

justification for the delay" and defendant did not agree to any continuances. *Contrast id*. Here, there is *no evidence* in the record supporting the backlog of cases, other than a general use in argument of the word "backlog" and the listing of cases tried during some weeks of court in State's Exhibit A. As noted above, State's Exhibit A fails to address the final two years of the delay, so even if it explained some of the delay, the State failed to address a large portion of the delay. As in *Farmer*, the State must do more than assert a general "backlog" of cases. *See id*. This factor weighs against the State heavily. We thus turn to the third prong.

3. Defendant's Assertion of His Right to a Speedy Trial

During the pendency of his case, defendant filed two *pro se* motions to dismiss his case due to speedy trial violations, and his attorney filed one, all in September of 2018. The trial court's order "weighs heavily" against defendant that he "merely filed a motion to dismiss for speedy trial" rather than "a demand for speedy trial[.]" Since, as discussed above, we must disregard the trial court's findings regarding defendant's acquiescence in any delay as well as Mr. Davis's testimony this factor carries little weight. We also note defendant sent earlier pro se communications to the trial court, and although they did not use the words "speedy trial," they do express defendant's desire for information regarding why his case was not proceeding. We turn to the final prong.

4. Prejudice

Last, as to prejudice, defendant argued in his motions to dismiss that he has been unable to adequately prepare for trial or garner witnesses in his defense. Defendant was arrested in 2012, but the State waited until 2017 to file two charges of murder -- far more serious charges than the State initially filed. We need not speculate what the prejudice of the delay might have been as the delayed murder charges resulted in life imprisonment without parole. If defendant had been tried and convicted on the charges initially filed, he could not have been subjected to life imprisonment without possibility of parole. Defendant was not charged with murder for over five years after the date of his arrest, and defendant was in jail for the entire time. Defendant's imprisonment and the State's delay in imposing far more serious charges support his claim of prejudice, as he was unable to assist in his trial preparation and attempt to find potential witnesses and other evidence which would have been more readily available six years earlier. Further, the delay of six years is so substantial, the delay alone indicates prejudice, particularly given that fact that the State presented no competent evidence justifying the delay.

Because the Sixth Amendment right to a speedy trial protects only the defendant and not the State, the trial court erred in considering alleged prejudice to the State by the delay. In addition, we note the State was ultimately not "significantly prejudiced" or even slightly prejudiced by the delay as it obtained convictions for second-degree murder and attaining the status of violent habitual felon, charges it elected to bring five years after the incident. This factor weighs heavily against the State.

C. Summary

In conducting the analysis directed by *Barker*, we find that every factor weighs either in favor of defendant, against the State, or not clearly in favor of either party. The State did not meet its burden of explaining valid reasons for the six-year delay of trial. Even if we were to assume that Mr. Davis's initial trial strategy of letting things "cool down" was proper for our consideration, this alleged strategy would explain less than half of the delay. Finally, the delay at issue here is so substantial that its duration alone speaks to prejudice, a reality only underlined by the State's failure to justify or explain it. We must therefore vacate defendant's judgments due to a violation of his constitutional rights to a speedy trial. Accordingly, we need not address defendant's other issues on appeal.

III. Conclusion

Based upon the delay of over six years from defendant's arrest until his trial, because the State failed to carry its burden of presenting valid reasons for the delay, we reverse the trial court's order denying defendant's motion to dismiss and vacate defendant's judgment.

REVERSED and VACATED.

Judges ARROWOOD and BROOK concur.

STATE v. NUNEZ

[274 N.C. App. 89 (2020)]

STATE OF NORTH CAROLINA
v.
ENRIQUE AMAURIS NUNEZ, DEFENDANT

No. COA19-1169

Filed 20 October 2020

Search and Seizure—driving while impaired—lawfulness of seizure—disabled vehicle—activation of blue lights

In a prosecution for driving while impaired arising from a car accident, where an officer activated her blue lights upon arriving at the scene and finding defendant in the driver's seat of his disabled vehicle (which had two flat tires and a broken mirror), the trial court properly denied defendant's motion to suppress because the officer did not initiate an unlawful seizure by merely activating the blue lights and not doing anything to impede defendant's movement. Rather, the seizure of defendant—which was supported by a reasonable suspicion of criminal activity—did not occur until a second officer approached the vehicle, smelled an odor of alcohol, and began questioning defendant.

Appeal by defendant from judgment entered 10 July 2019 by Judge Craig Croom in Wake County Superior Court. Heard in the Court of Appeals 12 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary L. Maloney, for the State.

Michael E. Casterline, P.A., by Michael E. Casterline, for the defendant-appellant.

BERGER, Judge.

On January 4, 2017, Enrique Nunez's ("Defendant") motion to suppress was denied by the trial court, and Defendant was subsequently convicted of driving while impaired ("DWI"). Defendant appeals, arguing that the trial court erred when it denied his motion to suppress. We disagree.

Factual and Procedural Background

In the early morning on May 11, 2015, Officer Crawford of the Raleigh Police Department was dispatched to check the status of a single car accident in a Biscuitville parking lot. While en route to the parking

lot, Officer Norton asked Officer Crawford to take the lead on scene because Officer Norton's shift was almost over. Around 1:48 a.m., Officer Crawford arrived at the parking lot. When Officer Crawford arrived, Officer Norton "was some distance from the disabled vehicle but had her police unit there with the blue lights activated." Officer Crawford observed that the vehicle was in the center of a public vehicular area with two flat tires and a missing mirror, and that Defendant was seated "in the driver's seat of the vehicle." Officer Crawford then approached the vehicle and requested Defendant's driver's license and vehicle registration through the already open driver's side window.

Officer Crawford noticed "a very strong odor of alcohol coming from the vehicle." Defendant admitted that he had "five or six beers" earlier that night. Officer Crawford then administered standardized field sobriety tests and two subsequent breath tests. Based on his experience, Officer Crawford determined that Defendant "consumed a sufficient quantity of . . . alcohol . . . to impair his physical and mental faculties." As a result, Officer Crawford arrested Defendant for DWI.

On January 3, 2017, Defendant filed a motion to suppress the evidence obtained by Officer Crawford. At the hearing, Defendant argued that Officer Norton initiated a seizure when she arrived on the scene and activated the blue lights on her patrol vehicle. Specifically, Defendant argued that Officer Norton did not have reasonable suspicion at that time to seize him.

On January 4, 2017, the trial court denied Defendant's motion to suppress. The trial court's order included the following relevant findings of fact:

> 5. Officer Crawford arrived within five minutes of the call to service.
>
> 6. When Officer Crawford arrived, Officer Norton, with the Raleigh Police Department, was already on scene.
>
> 7. Officer Norton did not testify and was not present at this hearing.
>
> 8. Officer Norton was some distance from the disabled vehicle but had her police unit there with the blue lights activated.
>
> . . .
>
> 12. The vehicle was in the middle of the parking lot and not in a parking space.

13. Officer Crawford observed that the vehicle had two flat tires and the mirror on one side was missing.

14. The keys were in the ignition and the Defendant was in the driver's seat.

15. At the time he approached the vehicle, Officer Crawford noticed a strong odor of alcohol emanating from the vehicle.

16. Officer Crawford asked the Defendant whether he had been drinking, and he responded affirmatively.

Based on these findings of fact, the trial court made the following relevant conclusions of law:

4. The parking lot of the Biscuitville is a public vehicular area.

5. The officers were not dispatched due to any alleged criminal activity.

6. They were dispatched for a disabled vehicle, which could be for a lot of things, including issues involving the health of the driver.

7. Officers turn on their blue lights for a number of reasons, including for the safety of the individual that might be inside of a vehicle.

8. The Defendant was not seized by Officer Norton.

9. The nature of the call to service authorized Officer Crawford to approach the vehicle and check on the welfare of the person or persons inside the vehicle.

10. The seizure of the Defendant did not occur until Officer Crawford approached the Defendant's vehicle smelled the odor of alcohol, and began questioning the Defendant.

11. The evidence here is adequate to support a finding that Officer Crawford had reasonable articulable suspicion to seize the Defendant. Therefore, the Defendant's seizure did not violate his rights under the Fourth Amendment to the United States Constitution and Article I, Sections 10, 20 and 23 of the North Carolina Constitution.

On July 10, 2019, a Wake County jury found Defendant guilty of DWI. Defendant appeals, arguing that the trial court erred when it denied his motion to suppress. We disagree.

Standard of Review

Our review of a trial court's denial of a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). A defendant's failure to challenge findings of fact renders them binding on appeal. *State v. Styles*, 362 N.C. 412, 417, 665 S.E.2d 438, 441 (2008). "Conclusions of law are reviewed *de novo*." *State v. Gerard*, 249 N.C. App 500, 502, 790 S.E.2d 592, 594 (2016) (citation and quotation marks omitted).

Analysis

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

"Article I, Section 20 of the Constitution of North Carolina likewise prohibits unreasonable searches and seizures and requires that warrants be issued only on probable cause." *State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 303 (2016) (citation omitted). A seizure occurs when the officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). There must be "a physical application of force or submission to a show of authority." *State v. Cuevas*, 121 N.C. App. 553, 563, 468 S.E.2d 425, 431 (1996) (citation omitted).

"The activation of blue lights on a police vehicle has been included among factors for consideration to determine when a seizure occurs." *State v. Baker*, 208 N.C. App. 376, 386, 702 S.E.2d 825, 832 (2010) (citation omitted). However, the mere activation of an officer's blue lights does not constitute a seizure under the Fourth Amendment. *See State v. Turnage*, 259 N.C. App. 719, 726, 817 S.E.2d 1, 6, *writ denied*, *temporary stay dissolved*, 371 N.C. 786, 821 S.E.2d 438 (2018) ("[T]he

mere activation of the vehicle's blue lights did not constitute a seizure as Defendant did not yield to the show of authority."); *see also State v. Mangum*, 250 N.C. App. 714, 726, 795 S.E.2d 106, 116-17 (2016) (specifying that for a defendant to be seized under the Fourth Amendment he must submit, or yield, to an officer's activation of blue lights or siren).

Here, Officer Norton was dispatched to check the status of a single car accident in a public vehicular area. When Officer Norton arrived and activated her blue lights, Defendant was sitting in the driver's seat of his disabled vehicle, which had two flat tires and a broken side mirror. While the activation of her blue lights is a factor in determining whether a seizure has occurred, there was no action on the part of Officer Norton that caused Defendant's vehicle to stop moving, or otherwise impede Defendant's movement. Rather, Officer Norton may have activated her blue lights to signal to Officer Crawford, or to even signal to Defendant that police assistance was available. *See Turnage*, 259 N.C. App. at 725-26, 817 S.E.2d at 5 ("A vehicle inexplicably stopped in the middle of a public roadway is a circumstance sufficient, by itself, to indicate someone in the vehicle may need assistance, or that mischief is afoot. At the very least, . . . it is not the role of this, or any other court, to indulge in unrealistic second-guessing of a law enforcement officer's judgment call." (*purgandum*)).

Here, Defendant was not seized by the mere activation of Officer Norton's blue lights. Therefore, the trial court did not err when it denied Defendant's motion to suppress.

Conclusion

For the foregoing reasons, we affirm the trial court's denial of Defendant's motion to suppress.

NO ERROR.

Judges DIETZ and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
WILLIAM LAMONTE QUICK

No. COA19-1023

Filed 20 October 2020

Appeal and Error—right to speedy appeal—effective assistance of appellate counsel—record on appeal—sufficiency

Where it took nineteen years to docket defendant's appeal from various criminal convictions because his prior counsel failed to timely prosecute the appeal, the record was insufficient to permit direct appellate review of defendant's arguments that he was deprived of his rights to a speedy appeal and to effective assistance of counsel. Consequently, defendant's appeal was dismissed without prejudice so that he could pursue a motion for appropriate relief in the trial court and develop the facts in an evidentiary hearing.

Appeal by Defendant from Judgments entered 19 April 2000 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 26 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

HAMPSON, Judge.

William Lamonte Quick (Defendant) appeals from Judgments entered on 19 April 2000 upon his conviction of Felony Possession of Cocaine, Possession of a Firearm by a Felon, Possession of a Weapon on School Property, and Misdemeanor Resisting a Public Officer, Second Degree Trespass, and Carrying a Concealed Weapon. The sole issue raised by Defendant on direct appeal from these convictions is whether he was deprived of a right to a speedy appeal and effective assistance of appellate counsel during the nineteen years it took for this appeal to be docketed in this Court because his prior appointed appellate counsel did not take action to timely prosecute the appeal. The State has filed a Motion requesting, in part, this Court dismiss Defendant's appeal without prejudice to his right to seek appropriate post-conviction relief

on this issue in the trial court. Because the Record before us is insufficient for us to evaluate Defendant's claims on direct appeal, we allow the State's Motion and dismiss Defendant's appeal without prejudice to his right to seek post-conviction relief.[1]

Factual and Procedural Background

The Record before us tends to show the following:

On 21 January 1999, a Wake County Grand Jury indicted Defendant for Possession with Intent to Sell and Deliver Cocaine, Possession of a Firearm by a Felon, Resisting a Public Officer, Possession of a Firearm on School Property, Trespass, and Carrying a Concealed Firearm. At some point before trial, a Competency Hearing was held regarding Defendant's ability to stand trial. The Record does not contain any transcript of Defendant's Pretrial Competency Hearing.

Defendant's case came to trial in Wake County Superior Court on 18 April 2000. At trial, the State presented the testimony of Raleigh Police Officer Richard Hoffman (Officer Hoffman). Officer Hoffman testified that, on 2 March 1999, he and his partner were patrolling the area around Birch Wood Apartments. The officers saw a group of four men in a courtyard where police had received complaints of drug activity. The officers approached the men to speak with them. Two of the men stopped, but Defendant ran.

Officer Hoffman chased Defendant through private yards and an elementary school's grounds. During the chase, Officer Hoffman testified he saw Defendant remove a jacket and throw it onto the ground. Defendant then tried to hail a taxi cab, but Officer Hoffman was able to catch up and grab Defendant before he could escape in the cab. Shortly after arresting Defendant, Officer Hoffman retrieved the jacket he said he had seen Defendant discard. Officer Hoffman testified that he found a silver .380-caliber handgun, loaded with six rounds, and 3.0 grams of cocaine in the jacket.

After the State and Defendant presented evidence, the jury found Defendant guilty of all charges—with the exception of Possession of Cocaine with Intent to Sell or Deliver on which the jury returned a guilty

---

1. The State, as part of its Motion, originally requested this Court also compel Defendant to produce additional transcripts from a prior appeal arising from different charges against Defendant. Defendant produced the additional transcripts in responding to the State's Motion. The State filed a Motion to Withdraw the portion of its Motion to Dismiss asking this Court to order Defendant to produce additional transcripts. We grant the State's Motion to Withdraw this portion of its Motion to Dismiss.

verdict on the lesser included offense of Possession of Cocaine. The trial court sentenced him to consecutive prison terms of 8-10 months for Possession of Cocaine, 20-24 months for Possession of a Firearm by a Felon, and 8-10 months for the consolidated misdemeanor charges. Defendant gave oral Notice of Appeal in open court. The trial court appointed the Appellate Defender as appellate counsel with trial counsel, Mr. Graham, as an alternate.

On 25 April 2000, the Appellate Defender declined appointment and served notice to Mr. Graham that he was responsible for Defendant's appeal. On 9 July 2002, Mr. Graham moved to withdraw as Defendant's appellate counsel and to appoint Mr. Lemuel Hinton in his place. The Motion to Withdraw was allowed the same day.

Years passed with nothing being done to process Defendant's appeal until December 2018 when Defendant contacted Prisoner Legal Services, Mr. Hinton, and the Officer of the Appellate Defender regarding the status of his appeal. On 29 April 2019, Prisoner Legal Services filed a Motion for Reappointment of Legal Counsel. Attached to this Motion was an affidavit from Mr. Hinton in which he stated that he was initially unaware of his appointment in 2002. Mr. Hinton also stated he received copies of the trial transcripts in this case, but could not recall when or how he received them.

Ultimately, Mr. Hinton realized, at some point, he was appointed to represent Defendant on appeal in this matter, but "mistakenly allowed the time to lapse for preparing the appeal." On 21 May 2019, the Wake County Superior Court appointed the Appellate Defender to represent Defendant in this appeal. This Court entered Orders to deem Defendant's appellate filings in this case timely and to clarify that the appeal would proceed under the North Carolina Rules of Appellate Procedure in effect as of 1 January 2019.

Issue

The dispositive issue is whether the Record before us is sufficient for this Court to review Defendant's Speedy Appeal and Ineffective Assistance of Appellate Counsel claims on direct appellate review.

Analysis

We review alleged violations of constitutional rights de novo. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). For speedy appeal claims, any "undue delay in processing an appeal *may* rise to the level of a due process violation." *State v. China*, 150 N.C. App. 469, 473, 564 S.E.2d 64, 68 (2002) (citation and quotation marks omitted).

In determining whether a defendant's constitutional due process rights have been violated by delays in processing the appeal, we consider the following factors: "(1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his right to a speedy appeal; and (4) any prejudice to defendant." *Id.* (citing *State v. Hammonds*, 141 N.C. App. 152, 158, 541 S.E.2d 166, 172 (2000)). No one factor is dispositive; the factors are related and are considered along with other relevant circumstances. *Id.*

Here, the nineteen-year delay in processing Defendant's appeal is more than "lengthy and sufficient" to warrant consideration of the remaining *China* factors. *Id.* at 474, 564 S.E.2d at 68 (six-year delay in "processing defendant's appeal is lengthy and sufficient to examine the remaining factors"). Also, as in *China*, Defendant contends the reason for the delay in his appeal was the ineffective assistance of his prior-appointed appellate counsel.

By his own admission, Mr. Hinton, Defendant's prior appellate counsel, became aware he was appointed as Defendant's appellate counsel, but he "mistakenly allowed the time to lapse for preparing the appeal." Despite the delivery, at some point, of transcripts of Defendant's trial, no further action was taken by appointed appellate counsel in the appeal for nineteen years. Indeed, the facts surrounding the length of the delay and reason why the appeal was so delayed appear relatively well-established on this Record. It is the remaining two factors—Defendant's assertion of his right to a speedy appeal and the resulting prejudice, if any, from the delay—that, in addition to any other relevant circumstances, require additional evidentiary development.

For instance, in *China*, we observed the defendant's six-year silence in asserting his right to appeal was "deafening" and, although not dispositive, weighed heavily against his due process claims. *Id.* at 474-75, 564 S.E.2d at 68. Here, Defendant did not inquire about his appeal for approximately eighteen years, which absent other facts, would weigh against his current assertion of a right to a speedy appeal. However, on appeal, Defendant argues his "mental illness, developmental disabilities, and neurological disorders" prevented him from asserting his right to a speedy appeal during this time period. The Record before us contains a Pretrial Competency Report outlining conflicting findings as to Defendant's mental illness, developmental disabilities, and neurological disorders. The Record contains no transcript of the Competency Hearing itself. Defendant points to a number of references in the Record to Defendant's mental illness including diagnosis of bipolar disorder, medications, and pretrial suicide attempts.

Defendant was, however, found competent to stand trial and assist in his defense at the time of the original trial. The Record, at this stage, is underdeveloped as to what, if any, impact Defendant's alleged mental illness, developmental disabilities, and/or neurological disorders had during the time his appeal was allowed to languish and on his ability to inquire as to the status of his appeal.

Likewise, Defendant contends he suffered prejudice resulting from the passage of time. For example, Defendant contends even though there are transcripts of the evidence presented at his trial there are no transcripts of jury selection, opening statements, closing arguments, the competency hearing, or the jury instructions. As such, Defendant argues appellate counsel cannot effectively identify, isolate, and brief issues for appeal, and further, that this constitutes the "most serious" form of prejudice.

Defendant's counsel included in the Record a number of emails with court reporters and record-keepers indicating there are likely no "notes, tapes, or discs" from the reporters regarding the unreported portions. Defendant also asserts "some individuals associated with the proceedings are unavailable for purposes of record reconstruction assistance." Defendant points out one of the reporters is deceased, and Defendant contends his trial counsel, Mr. Graham, joined the Attorney General's office and is "aligned with the party-opponent and thus has a conflict which prohibits him from engaging in the reconstruction process."

Again, however, Defendant's arguments would require us, in the first instance, to make factual determinations not only as to the veracity of his claims, but also whether and what prejudice resulted in his ability to reconstruct the Record or to identify potential issues on appeal that were lost because of the failure to reconstruct the Record in its entirety.

Defendant has not filed a Motion for Appropriate Relief in this Court pursuant to N.C. Gen. Stat. § 15A-1418, which might provide an avenue to simply remand the matter to the trial court for an initial determination. Instead, Defendant urges us to resolve these issues on direct appeal. This Court is generally not a fact-finding court, and we are unable to resolve these questions of fact on the Record before us. *See Johnston v. State*, 224 N.C. App. 282, 302, 735 S.E.2d 859, 873 (2012). Rather, this case is analogous to claims of ineffective assistance of counsel made on direct appeal.

For "ineffective assistance of counsel claims brought on direct review," we decide the claims "on the merits when the cold record reveals that no further investigation is required, i.e., claims that may

be developed and argued without such ancillary procedures as . . . an evidentiary hearing." *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation and quotation marks omitted). When we determine such ancillary procedures are needed, "we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court." *Id.* at 123, 604 S.E.2d at 881.

After an evidentiary hearing, "[a] trial court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review . . . [i]f the time for appeal has expired and no appeal is pending, by writ of certiorari." *State v. Morgan*, 118 N.C. App. 461, 463, 455 S.E.2d 490, 491 (1995) (citation and quotation marks omitted) (modifications in the original). Consequently, we dismiss Defendant's direct appeal, without prejudice, to permit Defendant to pursue a Motion for Appropriate Relief on the issues of his speedy appeal and related ineffective assistance of counsel claims and to develop the facts in the trial court in an evidentiary hearing.

Conclusion

Accordingly, for the foregoing reasons, we dismiss Defendant's appeal without prejudice to pursue the claims asserted in this appeal through a Motion for Appropriate Relief in the trial court.

DISMISSED.

Judges TYSON and BROOK concur.

STATE OF NORTH CAROLINA
v.
UTARIS MANDRELL REID, DEFENDANT

No. COA19-205

Filed 20 October 2020

1. Criminal Law—post-conviction motions—newly discovered evidence—Beaver factors—not satisfied

The trial court abused its discretion by granting defendant, who had been convicted of first-degree murder more than twenty years earlier, a new trial on the grounds of newly discovered evidence pursuant to N.C.G.S. § 15A-1415(c). Defendant failed to satisfy the factors set forth in *State v. Beaver*, 291 N.C. 137 (1976), where the testimony of the witness who came forward was internally inconsistent and contrary to his sworn affidavit, trial counsel knew that the witness may have had information concerning the victim's death but failed to use available procedures to secure his testimony, and the testimony was inadmissible hearsay and not admissible under Evidence Rule 803(24) because defendant failed to file a proper notice of intent prior to the hearing on the motion for appropriate relief.

2. Criminal Law—post-conviction motions—newly discovered evidence—Beaver factors—due process rights

The trial court erred by concluding that the due process rights of defendant, who had been convicted of first-degree murder more than twenty years earlier, would be violated if he were not allowed to present "newly discovered evidence" at a new trial. The standard for granting a new trial for newly discovered evidence was set forth in *State v. Beaver*, 291 N.C. 137 (1976), and defendant failed to satisfy that standard.

Judge DIETZ concurring by separate opinion.

Appeal by the State from order entered 7 December 2018 by Judge C. Winston Gilchrist in Lee County Superior Court. Heard in the Court of Appeals 15 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary Carla Babb, for the State.

North Carolina Prisoner Legal Services, Inc., by Lauren E. Miller, for the defendant.

BERGER, Judge.

On July 24, 1997, Utaris Mandrell Reid ("Defendant") was found guilty of first-degree murder and common law robbery. Defendant appealed his conviction and argued that the trial court erred when it denied his motion to suppress his confession to murdering and robbing John Graham. In an unpublished opinion filed on October 19, 1999, this Court upheld Defendant's conviction and determined that the trial court did not err when it denied Defendant's motion to suppress. *State v. Reid*, No. COA98-1392, 135 N.C. App. 385, 528 S.E.2d 75 (N.C. Ct. App. Oct. 19, 1999) (unpublished).

Defendant has since filed a series of post-conviction motions, including this motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1415. On December 7, 2018, the trial court granted Defendant's motion for appropriate relief and vacated Defendant's conviction on the grounds of newly discovered evidence pursuant to N.C. Gen. Stat. § 15A-1415(c), and a violation of Defendant's due process rights.

The State appeals, arguing that the trial court (1) erred when it determined that Defendant's confession was a "purported confession;" (2) abused its discretion when it granted Defendant a new trial; and (3) erred when it determined that Defendant's due process rights would be violated if he were not allowed to present the new evidence at a new trial. We agree and reverse the decision of the trial court.

Factual and Procedural Background

On September 30, 1996, the trial court made the following relevant findings of fact related to Defendant's motion to suppress:

> 1. On October 21,1995, Mr. John Graham, a 69 year old black male, was operating a cab for Service Cab Company. At approximately 7:15 p.m. on the above date, Officer Baca of the Sanford Police Department received a call to Humber Street in reference to an assault. He found Mr. Graham lying on his back approximately 20 feet from his vehicle. Mr. Graham had facial injuries that were visible to Officer Baca. Mr. Graham told the officer that he had been assaulted by young black males who had ridden in his cab. Due to Mr. Graham's physical condition, the officers were not able to get very much information from him concerning the identity of the black males who had assaulted him.

2. On December 17, 1995, Mr. Graham died as a result of complications from the injuries he sustained during the assault on October 21, 1995. He was never physically able to assist in identifying his attackers.

3. Detective Jim Eads of the Sanford Police Department was assigned to investigate the October 21, 1995 attack on Mr. Graham. Detective Eads at that time had ten (10) years of experience as a detective with the Sanford Police Department. On December 20, 1995, Detective Eads went to the residence of the defendant's grandparents in order to speak with the defendant. Detective Eads spoke with the defendant's grandfather and told him he needed to speak with the defendant at the police department for 15 to 20 minutes. The defendant then accompanied Detective Eads to the police department.

4. Upon arrival at the police department, Detective Eads and the defendant went to one of the interrogation rooms in the detective division. At approximately 4:19 p.m., Detective Eads advised the defendant of his Miranda Rights using State's Exhibit 1. Detective Eads read each right of the Miranda Warning to the defendant. After reading each right to the defendant, Detective Eads told the defendant to place his initials by the right indicating he understood that right. The defendant initialed each right. Detective Eads then read the Waiver of Rights at the bottom of State's Exhibit 1 to the defendant and asked the defendant to sign at the bottom of the waiver if he understood the waiver and wanted to talk to Detective Eads. The defendant signed the Waiver of Rights.

5. During the rights warning, the defendant and Detective Eads were alone. Detective Eads had no problems communicating with the defendant. The defendant was very attentive during the process. He did not stutter.

6. After the rights advisement and waiver, Detective Eads told the defendant that he was investigating the assault on Mr. Graham. He also told the defendant that Mr. Graham had died. The defendant told Detective Eads "I am not going down for this by myself." The defendant then proceeded to tell Detective Eads about his involvement in the assault on Mr. Graham. This took the defendant about 15

minutes. During this time, Detective Eads did not write down any notes. The defendant did not stutter during this time.

7. After the defendant admitted to Detective Eads that he had been involved in the assault and robbery of Mr. Graham, Detective Eads contacted a detective assigned to juvenile matters, Harold Layton. Detective Eads' asked Detective Layton to come to the police department to assist in making arrangements for placing the defendant in secure custody.

8. After calling Detective Layton, Detective Eads went back to the defendant and spoke with him about putting his statement in writing. The defendant told Detective Eads he could not write very well; however, he agreed to allow Detective Eads to write the statement for him. Detective Eads wrote a statement based on what the defendant had told him. This statement is State's Exhibit 2.

9. After writing the statement, Detective Eads went back over it with the defendant. He placed the statement in front of the defendant and read it to the defendant word for word as it was written. The defendant initialed the beginning and ending of each paragraph as well as two corrections on the second page. Detective Eads asked the defendant to sign the bottom of each page if he agreed that the statement was true. The defendant then signed the bottom of each page of the statement. The statement was signed at 6:25 p.m. on December 20, 1995.

10. After signing the statement, the defendant was allowed to call his grandmother. She came to the police department and was told by the officers what had happened. She was given an opportunity to speak with the defendant. The defendant's mother also came to the police department and was told what happened. She also was given an opportunity to speak with the defendant.

11. The defendant is a black male with a date of birth of July 22, 1981. At the time of this incident, he lived primarily with his grandparents. He was and still is enrolled in the Lee County School System at Bragg Street Academy and received the grades set out on Defendant's Exhibits 1 and 2.

> 12. Prior to this hearing, the defendant was tested and examined by Dr. Stephen Hooper of the Clinical Center for the study of Development and Learning at the University of North Carolina at Chapel Hill. Dr. Hooper is an expert on child neuropsychology. According to Dr. Hooper, the defendant has an I.Q. of 66. The defendant tested as having writing comprehension at the 5.2 grade level and a listening comprehension of the 3.5 grade level. The defendant can read at about the fourth grade level and write at about the third grade level. The defendant also reported to Dr. Hooper that he had used marijuana on December 20, 1995, but did not tell Dr. Hooper how much he had used. Dr. Hooper testified that the Miranda Rights given to the defendant were at a 4.9 grade level. The Waiver of Rights paragraph was at an 8.4 grade level and the confession signed by the defendant was at a 5.6 grade level. However, Dr. Hooper stated these figures were variable depending on how the information was conveyed to the listener. Dr. Hooper also stated that some 33 words on the confession were not understood by him and not factored into the calculations on the grade level of the confession.

Detective Eads testified at trial and read Defendant's confession to the jury. Defendant's signed confession was as follows:

> We were on Goldsboro Avenue the night the cab driver got beat up. It was me, Elliott McCormick, who they call L.L., and Anthony Reid, who they call Pop, and Duriel Shaw, who they call Shaw Dog. Elliott McCormick called the cab company for a ride and had the cab meet us at the new apartments on Goldsboro Avenue that sit at the back fence to Oakwood Avenue apartments.
>
> While the cab was coming, we got to planning how we were going to rob whoever the driver was. Duriel Shaw and Elliott McCormick were planning it out. Duriel was to snatch the money and Elliott was going to punch him. The older man who use to sell ice cream to us was the driver when the cab pulled up. All of us got in the back seat of the cab. Me, Duriel Shaw, Anthony, and Elliott McCormick. We were going to Kendale. Elliott McCormick and Duriel Shaw were going to stay together that night and Anthony Reid and I were going to stay together. Anthony is my double first cousin. Elliott is related to me also. Elliott McCormick is related to me through my father.

We directed the driver to the Kendale area on Humber Street by Hallman Foundry. We had him stop because we were going to rob him at that time. The meter read about $4 and none of us had any money. The driver, who we call Dad because he was so old, always drove real slow which took more time on the meter and increased the price. We had him stop in the roadway at the foundry and were going to rob him in the car. Me and Duriel Shaw tried to do so first in the car. We reached over the front where he sat and I tried to grab under his leg where he kept some money and Duriel Shaw was grabbing in his shirt.

The old cab driver got to grabbing our arms and moving around, so we stopped and we all jumped out of the cab and started returning. We all ran to the back of O'Connell's Supermarket and stopped. And Anthony Reid . . . said, '[expletive deleted] that, we're about ready to go back and rob him.'

We walked back to the cab. The cab driver was still in the car and sitting in the road on Humber Street and talking on his microphone. As we approached him, he jumped out of the cab, started cussing, saying, 'I'm going to kill all you all . . . [expletive deleted],' and still walking towards us. We began beating him and found some wood sticks nearby and used them to hit him with also. The cab driver fell to the ground on the pavement on the roadway. Duriel Shaw, Anthony Reid, Elliott McCormick, and I began going through his pockets. I found $5 in one dollar bills in his left front shirt pocket and I took it. I don't know if the rest of them got any money or not, but they were going through his pockets. We decided also, when we walked back to the cab driver as he sat in the road, to take his car, but we didn't. We just left it in the road. Elliott McCormick, Duriel Shaw, and Anthony Reid, and I all ran away together to Windham's Electronics and over to Crown Cable, and then ran behind Kerr Drugs and split up afterwards. Duriel and Elliott went to Elliott McCormick's house, and me and Anthony went to my house. We did not go back over toward Dalrymple and Humber Street.

I don't recollect anyone taking anything from the car, at least I know I didn't. The next day we all got together on Shawnee Circle at the back fence and talked about it.

> We talked about how we could have killed him and how we could have taken the cab. We all promised not to talk about it. I tried to call Central Carolina Hospital after we beat him, but I didn't know his name. I think he use to go to New Zion Baptist Church with us. I also think he was a friend of one of my mom's friends. My grandmother had even told me she knew his wife. I never said anything to anyone about it until tonight.
>
> I really would like to apologize for what I've done and especially to an old man like him. I was never ever like this until I got to hanging around with these other boys and drinking and smoking marijuana. I usually drank beer and not liquor. I had been drinking beer that night and had drank a 22 ounce IceHouse Beer. The rest of us – the rest had been drinking gin, Canadian Mist, white liquor and beer. We were getting the beer and liquor from an Ann Budes who stays nearby where we were staying – were standing around at the new apartments on Goldsboro Avenue. We all had also been smoking marijuana in blunts by inserting marijuana in the cigar so the cigar would cover the smell.
>
> I'm truly sorry for what I've done and I tried to turn a bad thing around that I have done by being truthful and cooperative concerning this incident. I swear that all I've told Detective J.M. Eads of the Sanford Police Department is the truth, and it was Duriel Shaw, Elliott McCormick, and Anthony Reid and myself who beat the cab driver and that we also used sticks to do this because we intended to rob him and did rob him after we beat him. I have further allowed Detective Eads of the Sanford Police Department to write this statement for me in order that I may accurately reflect what happened that night and, again, how truly sorry I am for what I've done.

On July 24, 1997, a Lee County jury found Defendant guilty of first-degree murder and common law robbery. Defendant appealed, alleging the trial court erred when it denied his motion to suppress his confession.

In an unpublished opinion filed on October 19, 1999, this Court upheld Defendant's conviction and determined that the trial court did not err when it denied Defendant's motion to suppress. In so holding, we considered information in the record that Defendant was a slow learner,

had an overall IQ of 66, read on a third-grade level, and other circumstances surrounding his confession. We noted that

> [w]hile a defendant's subnormal mental capacity is a factor to be considered in determining whether the defendant's waiver of rights is intelligent, knowing and voluntary, such lack of intelligence, standing alone, is insufficient to render a statement involuntary if the circumstances otherwise indicate that the statement is voluntarily and intelligently made. *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983). Likewise, a defendant's young age is a factor to be considered, but his youth will not preclude a finding of voluntariness in the absence of mistreatment or coercion by the police. *Id.*
>
> Despite the evidence cited by defendant of his below average intelligence, comprehension, and verbal abilities, there is substantial evidence in the record to support the trial court's determination. Detective Eads testified that he asked defendant whether he understood each right and whether he had any questions. Defendant responded that he understood and that he did not have any questions. Detective Eads further testified that he did not have any difficulty communicating with defendant, and that he did not have to repeat himself to make himself understood by defendant, who was very attentive. He also testified that defendant did not stutter during the interview.
>
> None of the witnesses presented by defendant were present in the interrogation room to observe defendant and to determine whether he actually understood his rights at the time. There is nothing in the record to indicate that Detective Eads or any police officer coerced defendant into giving a statement. To the contrary, Detective Eads' testimony indicates that defendant voluntarily gave the statement to not "go down for this alone."
>
> Because there is ample evidence to support the court's findings of fact, those findings are binding. *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982). We also find that the court's findings of fact support its conclusions of law and its order denying the motion to suppress.

State v. Reid, No. COA98-1392, at *4-6 (N.C. Ct. App. Oct. 19, 1999) (unpublished).

Defendant subsequently filed post-conviction motions, including this motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1415(c). Specific to this motion, Defendant alleged that William McCormick ("McCormick") had provided newly discovered evidence in an affidavit dated June 14, 2011. McCormick's affidavit contained the following assertions:

> 3. In 1995, I was sixteen years old, and I lived with my mother and brother Elliott McCormick at 417 Judd St. in Sanford, NC.
>
> 4. At the time, my mother worked the night shift and was also a minister.
>
> 5. Utaris Reid often visited my home and spent time with my brother and me.
>
> 6. Utaris Reid was younger than me, and he lived about four houses away on Shawnee Circle.
>
> 7. Utaris came to our house often because his mother and her boyfriend were drug-addicts, and he often had to provide for himself.
>
> 8. Utaris would visit with his grandmother who lived out in the country. She cared for Utaris and bought him clothes and necessities.
>
> 9. Utaris was in special education classes in school, and he was slow.
>
> 10. My brother Elliott and I would often use taxi cabs to go to and from our home at night.
>
> 11. I knew cab driver John Graham by the nickname "Pop."
>
> 12. On the night that Mr. Graham was assaulted, I remember staying at home.
>
> 13. My mother, a minister, anointed my head and my brother Elliott's head with oil, and she was moving about the house speaking in tongues. She said that she had a feeling that something bad was going to happen that night, *so she stayed home from work*. She made my brother and I stay home even though we wanted to go out.
>
> 14. At the time, my brother Elliott and I were involved in selling crack cocaine on the street near the Goldsboro apartments.

15. Since we were not allowed to leave the house that night, our friends came to the house to get drugs.

16. Robert Shaw, Norman Cox, and T. Bristow *came to the house, and they were sweating and out of breath. I learned from Shaw that they had left a cab without paying the fare and ran to the house.*

17. *My mother made my friends leave the house that night, and they did.*

18. The next day, I had a conversation with Robert Shaw. *He told me that when he, Norman Cox, and T. Bristow left my house, they got a cab to take them across town.* John Graham, or "Pop," was the cab driver.

19. Shaw told me that he told Pop that they did not have enough money to pay the fare. Pop stopped the cab near the foundry and told the boys to get out. Shaw was in the front passenger seat, and Cox and Bristow were in the back seat. Cox and Bristow got out of the cab. As Shaw was getting out of the cab, Shaw grabbed Pop's money bag. Pop grabbed Shaw's gold necklace, broke it, and pulled it off Shaw. Shaw began to punch and hit Pop, trying to get his necklace back. Cox and Bristow joined Shaw beating, kicking, and stomping Pop. Shaw got his necklace away from Pop and the three boys ran. There was only $5 in the money bag.

20. After Pop died, the police came to my house because they were looking for teenage boys who used cabs with Judd Street destinations.

21. The police picked up my brother Elliott and Utaris Reid and took them to the police station.

22. My brother Elliott told me that he was placed in an individual room. He said that the police were yelling and throwing chairs around in the room trying to get him to confess to murder. They asked him to sign a paper, but Elliot[t] refused to sign.

23. Elliot[t] has since passed away.

24. I was not interviewed by the police or any attorneys involved in Utaris Reid's case.

> 25. After Utaris Reid was convicted and sentenced, I felt bad because I knew that he did not commit the murder.
>
> 26. I went to the Sanford Police Department and spoke to Detective Freeman Worthy. I told Detective Worthy that Utaris Reid did not commit the crime he was convicted of. I told him that Shaw, Cox, and Bristow committed the crime.
>
> 27. In 2005, I saw Detective Worthy at the Piggly Wiggly supermarket. I told him again that they convicted the wrong man, and I told him that Shaw, Cox, and Bristow committed the crime.

(Emphasis added).

At the hearing on the motion for appropriate relief, McCormick testified over the State's objection that Defendant was "slow." McCormick also testified that he and Defendant were friends when they were younger and "smoked weed together."

McCormick testified, contrary to his affidavit, that on the night John Graham was murdered, "[m]y mom worked the graveyard, and this particular night, my mom was working graveyard." According to McCormick, the graveyard shift was from 11:00 p.m. to 7:00 a.m. McCormick and his brother, Elliott, had planned to go across town that night to sell drugs, but their mother made them stay home. According to McCormick, he and Elliott invited Robert Shaw ("Shaw"), Antonio Bristow ("Bristow"), and Norman Cox ("Cox") over to their mother's house. McCormick then testified to the subsequent series of events:

> When they finally got there and the doorbell rang, my mom was like, who is at the door? She said, I told y'all, y'all not-going nowhere tonight. We went to the door. [ ] Shaw, [ ] Bristow, [ ] Cox, and you know, they was – you know, we looked outside. The cab wasn't there, but they was there, and then they was sweating and, you know, out of breath, running from wherever they came from[.]
>
> . . .
>
> [Shaw] told us that they had just jumped out of the cab. They jumped out of the cab because they didn't have no money, so they jumped out of the cab.

According to McCormick, Shaw, Bristow, and Cox were at his mother's house for no more than 10 minutes before his mother ran them off.

When asked if Shaw told him anything else the night Graham was murdered, McCormick replied

> That night? *Not that night. It was already wee hours of the morning. It was already late night anyway*, so, but they, you know, because my mama ran us off, the next day they told me what – they told my brother and I what they had done. They assaulted Mr. Johnny Graham.

(Emphasis added).

McCormick testified that Shaw told him that he, Norman, Bristow and Cox killed Graham before they arrived at the McCormick house. Specifically, according to McCormick, Shaw told him that:

> Well, he told how he called a cab in the middle – well, when he called the cab, he told them where he was coming, you know, to [Judd] Street, you know, which is our address, and said when they got by around the Hallman Foundry, they just told him, they said, Pop, you know, we only got five dollars. He was like, that's all y'all got? And Pop, you had to know him. Pop, he is an old guy. Cab driver. He talked junk, you know. We talked junk to him. You know. And he said – he told, said, Pop, we only got five dollars. He said, look, y'all get y'all book, and he used profane language, told them to get out of his cab, you know, if that's all you got, you know. And [Shaw] was sitting in the front seat. [Shaw] told me once he went to jump out the cab, he grabbed the money bag. And Mr. Pop had a money bag. He grabbed the money bag. Pop still had his seatbelt on. He reached and grabbed [ ] Shaw by the back of the shirt, and when he grabbed the back of his shirt, he grabbed his necklace. And when [ ] Shaw jumped out of the car, he kept his necklace in his hand. So [ ] Shaw wanted to get his necklace back, so [ ] Shaw told me Pop was trying to call in dispatch with the CB thing they had in the car at the time. That's when they commenced to beating on him, trying to get his necklace back. And they beat the man, and they told me they beat him and they stomped him, but at the time, they didn't know they did, you know.
>
> . . .
>
> Once they beat him and stomped him, and [ ] Shaw's necklace was broke, and Mr. Johnny still had it in his own

> hand. They had to end up prying it out of his hand to get the necklace out. You know. He held on tight to it. And they ran to our house as soon as they did. That's why, when they came to the door, they was sweating and out of breath.

Elliott was arrested along with Defendant for Graham's murder and spent 19 months in custody awaiting trial before the charges against him were dismissed. According to McCormick, he did not inform law enforcement about Shaw's purported confession because he lived by a street code, and Elliott told him not to say anything because the police had no evidence.

McCormick was also permitted to testify, over the State's objection, about alleged police interrogation "tactics," and that Defendant did not read his confession before he signed it. There was no evidence provided that McCormick was in the interrogation room when Defendant confessed. However, McCormick did testify that he was in court during Defendant's trial. After Defendant was convicted, but sometime "before 2005," McCormick purportedly told a detective that Defendant did not kill Graham.

On December 7, 2018, the trial court granted Defendant's motion for appropriate relief and vacated Defendant's conviction on the grounds of newly discovered evidence pursuant to N.C. Gen. Stat. § 15A-1415(c), and a violation of Defendant's due process rights. The trial court made the following relevant findings of fact:

> 1. . . . The principal State's evidence against Defendant was a statement taken from Defendant by the lead detective. Defendant was 14 years old and had a combined IQ of 66 when he signed the statement. No eyewitnesses testified against Defendant at trial. . . .
>
> 2. At trial, Defendant challenged the credibility of the written statement and offered an alibi defense. Trial counsel hired an investigator for the specific purpose of interviewing the McCormick brothers, William and Elliott, potential witnesses in the case, but was unable to interview them by the time of Defendant's trial. In 2011, Defendant's MAR investigator located William McCormick, and he was interviewed by the defense for the first time. Mr. McCormick testified at the MAR hearing that another teenager confessed to the assault and robbery the day after it occurred. The teenager was with

two others, who were not Defendant. Trial counsel would have offered this evidence if it was available at the time of Defendant's trial because it would exculpate Defendant and bolster his alibi defense.

. . .

7. Defendant filed a motion to suppress his written statement, and a hearing was held during the August 29, 1996 session of Lee County Criminal Superior Court before the Honorable Wiley F. Bowen. Judge Bowen denied the motion to suppress. On appeal, the denial of the motion to suppress was upheld. For purposes of the MAR, the Defendant's statement has been treated as properly admitted into evidence, with its weight and credibility for the jury.

8. The case was heard for trial at the October 1, 1996 session of Lee County Criminal Superior Court before Judge Bowen. A mistrial was declared because of a hung jury.

9. The case came on for trial again at the July 21, 1997 session of Lee County Criminal Superior Court before the Honorable Henry E. Frye.

10. On July 24, 1997, the jury found the defendant guilty of first degree murder based on the felony murder rule during the commission of a common law robbery.

11. Defendant was sentenced to a mandatory punishment of life imprisonment without parole. The court arrested judgment on the conviction for common law robbery.

. . .

14. The victim in the case, John Graham, worked as a cab driver on the date of offense, October 21, 1995. During his shift, he radioed for help. Other cab drivers and paramedics responded to his location within minutes, around 7:19 p.m.

15. Officers responded to the scene of the assault. The victim's cab was not secured, the police did not collect any physical evidence, and there were no eyewitnesses. There were no fingerprints, blood evidence, or any weapon.

16. The victim was unable to respond to paramedics except for opening his eyes in response to his name. He

suffered an apparent head injury from an assault or fall. His visible injuries were mostly minor puncture wounds, lacerations and abrasions around his left eye. Medical examination revealed a 3 centimeter by 3 centimeter hemorrhage to the right side of the victim's brain which, according to medical testimony at trial, could have been caused by Mr. Graham falling and hitting his head.

17. The victim was interviewed in the emergency room by police. The lead detective, James Eads of the Sanford Police Department, testified that the victim told police that two black males age 16 to 19 years old were responsible for the assault. During cross-examination at the first trial, Detective Eads testified that the victim gave the information to police and he recorded the information in his report. He also testified at the first trial that the victim told police that he had picked up the two black males before and that they had not taken anything from him on the night of the assault.

18. At the second trial, Eads changed his testimony and testified that the victim was unable to communicate verbally with him at all in the emergency room. Eads was cross-examined by Attorney Webb with his testimony from the first trial.

. . .

21. On December 20, 1995, James Eads, the same detective who interviewed the victim, went to Defendant's grandfather's house and picked up Defendant at about 4:15 p.m. to take him to the police station to interview him. The detective told Defendant's grandfather that he would bring him back in 15-20 minutes. Defendant's grandfather was elderly and the detective could not tell whether the grandfather was drinking.

22. Defendant was 14 years old and did not have a parent or guardian present when he was interviewed.

23. The Sanford Police Department had two juvenile detectives on their staff at the time. They would have left the police station at 4:00 p.m. when their shifts ended. Detective Eads did not use a juvenile detective when he interviewed Defendant. Detective Eads shift started at

8:00 a.m., but he waited until after the juvenile detectives left to pick up Defendant and interview him.

24. Juvenile detectives were available for the interview as they were on call twenty-four hours.

25. Detective Eads conducted the interview with Defendant in an interview room that was approximately 8 feet by 10 feet with a table and chairs and no windows.

26. Detective Eads did not record the interview with Defendant. He said that he was not certified in the operation of any tape recording equipment so he could not use it.

27. Detective Eads testified that Defendant talked or "rambled" uninterrupted for thirty minutes without having to be prompted with questions to continue talking.

28. Detective Eads wrote the statement that Defendant signed. The detective acknowledged that some of his own writing was difficult to read and he read the statement back to Defendant.

29. Detective Eads testified that he would have treated Defendant differently if he knew he had trouble comprehending, but he treated him as an ordinary 14-year-old.

30. Attorney Webb hired Dr. Steven Hooper, a child and adolescent neuropsychologist at the Child Development Institute at the University of North Carolina at Chapel Hill, as an expert witness. Dr. Hooper determined that Defendant had a full scale IQ of 66, which was in the first or second percentile for 14-year-olds. Dr. Hooper testified that the test was reliable and Defendant was trying hard.

31. Defendant's overall functioning was at a fourth-grade level. His writing was at a mid-third grade level and Defendant had disproportionately low deficits in visual attention and expressive language.

32. Dr. Hooper did a readability analysis to determine the grade level of the *Miranda* warnings given to Defendant and the waiver of rights form. The *Miranda* warnings were at a fifth grade level and the waiver of rights form was at a mid-eighth grade level.

33. Dr. Hooper conservatively estimated the written statement was at a mid-fifth grade level. There were thirty-three words he could not read so he did not include those. Had they been included, the grade level would likely have been higher.

34. Dr. Hooper opined that it was highly unlikely Defendant understood the *Miranda* rights or the waiver of rights form. He also opined that he did not think Defendant understood the written statement. Defendant's listening comprehension was his lowest area, at a mid-third grade level and his overall reading, decoding, and sight words were a 5.2 grade level.

35. According to the written statement, signed by Defendant, there were four young males involved in the victim's assault: Duriel Shaw, Anthony Reid, Elliott McCormick, and Defendant. This was a significant difference from the information alleged to have been provided by the victim in the emergency room immediately following the assault, in which he was said to have informed police he was attacked by two black males, 16-19 years old. According to the alleged statement of Defendant, the youths were riding in a cab driven by the victim and tried to reach into his shirt pocket and under his leg for money. When the victim resisted, the youths began to run away, but then returned. The victim got out of his car and walked towards the youths, saying that he would "kill you". Some of the youths then hit the victim, using wood sticks they picked up nearby. The victim fell on the pavement, where money was taken from his pocket.

. . .

37. John Love, a co-worker and good friend of the victim, testified at the second trial, but did not testify at the first trial. Love heard the victim call for help over the radio and went to the scene. He testified that he asked the victim who did this and the victim replied with three words or names, L.L., McCormick, and Reid. Love did not remember the order in which the victim said the names. However, Love did not provide this information to [ ] Detective Eads when he met with him shortly after the incident. Love said he did not "put together what he was talking about until

later." Love did not know whether the victim was just mumbling. Love did not claim the victim specified who "Reid" was, whether the Defendant or Anthony Reid.

. . .

48. At the evidentiary hearings, Defendant produced evidence through the testimony of William McCormick ("Mr. McCormick") and Attorney Fred Webb, additional documentary exhibits, and the transcripts of both trials and the hearing on Defendant's motion to suppress. The Court listened to the testimony and observed the demeanor of these witnesses, and finds that each gave credible and truthful testimony on every issue that was material to the findings of fact and conclusions of law which are necessary to reach a ruling on the issues raised in the instant matter. William McCormick was emotional during his testimony. His demeanor gave convincing force to his testimony.

49. Mr. McCormick was located by Defendant's investigator in 2011. He swore to an affidavit that was submitted as an exhibit to the MAR.

. . .

55. On the night that the victim was assaulted, Mr. McCormick and his brother, Elliott, were not allowed to leave their house on Judd Street. William McCormick expected three other juveniles, Robert Shaw, Antonio "T" Bristow, and Norman Cox to come to the McCormick house that night by cab. *Robert Shaw, T Bristow and Norman Cox showed up on the doorstep but there was no cab outside. Defendant was not with them and was never mentioned at any time. Shaw, Bristow and Cox were sweating and out of breath from running. Robert Shaw said they jumped out of the cab because they did not have any money. The evidence indicated Shaw had jumped out of the cab only a short time before this statement. Mr. McCormick's mother made Shaw, Bristow, and Cox leave.*

56. The next day, Robert Shaw told Mr. McCormick that he, Antonio Bristow, and Norman Cox assaulted the victim John Graham. Shaw said that he took the victim's money bag and when he tried to jump out of the cab the victim

grabbed Shaw's necklace, which broke. Shaw explained that they beat the victim to get the necklace back. Shaw did not say that Defendant was involved. Robert Shaw, T Bristow, and Norman Cox were not the juveniles named in the written statement introduced at Defendant's trial. *Shaw told William McCormick that Shaw, Bristow and Cox ran to McCormick's house "as soon as they did" the robbery.* The victim was in fact assaulted near the Hallman Foundry, located no more than a mile from William McCormick's house.

. . .

58. When he was 16 years old, Mr. McCormick sold drugs and lived a different life than when he testified before this Court. When he was a teenager, he did not get along with police and did not talk to the police because he followed a "street code." Before Defendant's trial, Mr. McCormick did not tell police the information that he testified to at the MAR hearing. He explained that the street code meant not to talk to police or help them do their job. Mr. McCormick explained that he no longer followed a street code and he decided to turn his life around after his brother was murdered in 2000.

59. This Court finds Mr. McCormick's testimony to be credible. The court finds that McCormick in fact has no motive to testify for Defendant other than to disclose the true facts known to him.

60. Attorney Webb represented Defendant at both trials and the direct appeal of his case. Attorney Webb had a degree and training in special education and was experienced working with adolescents. Defendant was 14 years old when Attorney Webb was appointed to his case and 16 years old when he was convicted. Attorney Webb recognized that Defendant was slow and had difficulty communicating.

61. Attorney Webb filed a motion to suppress the written statement and retained Dr. Steven Hooper. Following a hearing, the motion to suppress was denied.

62. Attorney Webb challenged the credibility of the police investigation and the written statement and raised an alibi defense at trial.

63. Before trial, Attorney Webb spoke to contacts "in the street" who had provided information that led him to believe Defendant was not involved in the crime. The names of the McCormick brothers, William and Elliott, came up as witnesses who had information that could be helpful to the defense. Attorney Webb moved for and secured funds to retain Investigator Mel Palmer for the specific purpose of locating and interviewing William McCormick. In the motions and orders for investigator funding, Attorney Webb specified that he was trying to locate William McCormick.

64. Investigator Palmer attempted to interview William McCormick, but was unable to locate him. Investigator Palmer made attempts to serve William McCormick with a subpoena but was unable to do so. McCormick's mother interfered with the investigator's efforts to locate William and would not allow him to be interviewed.

65. Attorney Webb was contacted by Defendant's counsel during the post-conviction investigation of Defendant's case. Attorney Webb reviewed the affidavit of William McCormick. Had Attorney Webb been able to locate and interview William McCormick at the time of trial, Attorney Webb would have called him to testify to the information contained in the affidavit.

66. Attorney Webb would have presented William McCormick's testimony because he found that it would have exculpated Defendant and bolstered Defendant's alibi defense.

67. William McCormick's testimony was evidence that went to Defendant's guilt or innocence, since it provided the identity of the actual perpetrators and tended to exonerate Defendant.

(Emphasis added).

The trial court then made the following relevant conclusions of law:

2. Defendant properly raised his newly discovered evidence claim pursuant to N.C. Gen. Stat. § 15A-1415(c).

3. Defendant Reid met his burden of proving the necessary facts by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1420(c)(5).

4. William McCormick's testimony is newly discovered evidence as defined by law. The details of his testimony were unknown to Defendant at the time of trial, and William McCormick was unavailable to Defendant at that time. Defendant could not have discovered or made available the new evidence from McCormick with due diligence. The new evidence has a direct and material bearing upon the Defendant's guilt or innocence. Defendant's motion was filed within a reasonable time of the discovery of the new evidence.

5. *The newly discovered evidence is probably true.*

6. *The newly discovered evidence is competent, material and relevant. It identifies the actual perpetrators of the offense and exculpates the Defendant.*

7. Evidence of William McCormick's personal observations of Robert Shaw, Antonio "T" Bristow and Norman Cox on the night of the offense, including that these three individuals were together, were sweating and out of breath, that neither a cab nor the Defendant were present, are admissible at trial.

8. Testimony from William McCormick regarding statements made by Robert Shaw that he, Bristow and Cox jumped out of a cab and ran because they did not have any money are *admissible as an excited utterance under North Carolina Rule of Evidence 803(2). Shaw was under the stress of a startling or unusual event at the time this statement was made, sufficient to suspend reflective thought, and causing a spontaneous reaction not resulting from fabrication.*

9. After careful scrutiny, the court concludes that the testimony of William McCormick about Robert Shaw's statement regarding the details of Shaw, Bristow and Cox assaulting the victim is admissible evidence under Rule 803(24). *First, the State is on notice that Defendant would offer such evidence at trial. Second, this hearsay evidence is not specifically covered by any other exception in Rule 803. Third, the evidence possesses circumstantial guarantees of trustworthiness equivalent to other hearsay exceptions because it constitutes an admission of criminal conduct by Shaw, is consistent with events*

actually observed by William McCormick the day before, when Shaw and the other youths arrived at McCormick's house out of breath having jumped and run from a cab, and is consistent with known circumstances of the case, including that the victim was assaulted by more than one young male person. Fourth, the evidence is material to the case. Fifth, the evidence is more probative on the issue of whether Shaw, Bristow and Cox, rather than Defendant, were the actual perpetrators of these crimes than any other evidence procurable by reasonable efforts. Defendant cannot reasonably be expected to procure the in-court confession of Shaw that Shaw himself is guilty of robbery and first degree murder. Sixth, admission of the evidence of Shaw's statements will best serve the purposes of the Rules of Evidence and the interests of justice. State v. Smith, 315 N.C. 76 (1985).

10. In addition to those circumstantial guarantees of truthfulness set forth above, Shaw's statements regarding the murder of the victim have the following circumstantial guarantees of truthfulness: (1) Shaw had personal knowledge of the events described; (2) Shaw had a strong motivation to confide the truth to his friend William McCormick and no reason to claim false responsibility for such serious acts which could expose him to criminal liability; and (3) there is no evidence that Shaw ever recanted his statement.

11. The evidence before the court does not support conclusions as to the availability or unavailability of the declarant Shaw for trial. Given the passage of more than twenty years in silence, Shaw's cooperation and availability for trial may well be doubted, but his unavailability cannot be assumed. If Shaw is unavailable, his statements to McCormick would be admissible in any case as statements against penal interest under Rule 804(b). However, taking Shaw's unavailability not to have been established, as the court must do given the Record before it, his statements to McCormick are still admissible under Rule 803(24) for the reasons set forth above.

12. Given the emotional impact and persuasive effect of William McCormick's testimony and the circumstantial indications of the truthfulness of Shaw's statements,

> it would be a manifest injustice to deny Defendant the opportunity to introduce McCormick's evidence regarding the statements of Robert Shaw that it was Shaw, Antonio Bristow and Norman Cox who killed the victim in this case. Admission of Shaw's statements under Rule 803(24) will best serve the interests of justice. It is consistent with the general purposes of the Rules of Evidence.
>
> 13. Defendant used due diligence and proper means to procure the testimony of William McCormick at Defendant's original trial.
>
> 14. The newly discovered evidence is not merely cumulative.
>
> 15. The newly discovered evidence does not tend only to contradict, impeach or discredit a former witness.
>
> 16. The newly discovered evidence is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. This was an extremely close case, tried once to a hung jury, *finally resulting in a conviction based largely on the purported confession* of the fourteen year old, mentally disabled Defendant. No physical evidence connected Defendant to the case, and alibi evidence was offered. The addition of credible testimony from William McCormick will probably result in a different outcome than that reached in the original trial.
>
> 17. The testimony of William McCormick points directly to the guilt of specific persons and is inconsistent with Defendant's guilt.
>
> 18. In addition, as an independent grounds for decision, denying Defendant the opportunity to present all of the newly discovered evidence to a trier of fact would, under the circumstances of this case, violate Defendant's federal and state constitutional rights to due process of law.

(Emphasis added).

Based upon these findings of fact and conclusions of law, the trial court vacated Defendant's conviction and ordered a new trial.

The State appeals, arguing that the trial court (1) erred when it determined that Defendant's confession was a "purported confession;" (2)

abused its discretion when it granted Defendant a new trial; and (3) erred when it determined that Defendant's due process rights would be violated if he were not allowed to present the new evidence at a new trial. At oral arguments before this Court, Defendant's attorney stated that Defendant was innocent of the crimes charged, but acknowledged that Defendant had not filed an affidavit of innocence in this or any other court.

We reverse the decision of the trial court.

Standard of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (citation and quotation marks omitted).

"Findings of fact made by the trial court pursuant to hearings on motions for appropriate relief are binding on appeal if they are supported by competent evidence." *State v. Morganherring*, 350 N.C. 701, 714, 517 S.E.2d 622, 630 (1999) (citation and quotation marks omitted). A "trial court's conclusions [of law] are fully reviewable on appeal." *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation and quotation marks omitted).

A trial court's findings of fact "may be disturbed only upon a showing of manifest abuse of discretion." *Id.* at 142, 628 S.E.2d at 35 (citation and quotation marks omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006) (citation and quotations omitted).

Analysis

On appeal, the State argues that the trial court (1) erred when it determined that Defendant's confession was a "purported confession;" (2) abused its discretion when it granted Defendant a new trial; and (3) erred when it determined that Defendant's due process rights would be violated if he were not allowed to present the new evidence at a new trial. We agree.

A defendant may file a motion for appropriate relief at any time following a verdict on

> the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which

> could not with due diligence have been discovered or made available at that time, including recanted testimony, and which has a direct and material bearing upon the defendant's eligibility for the death penalty or the defendant's guilt or innocence.

N.C. Gen. Stat. § 15A-1415(c) (2019). The defendant "has the burden of proving by a preponderance of the evidence every fact essential to support the motion." N.C. Gen. Stat. § 15A-1420(c)(5) (2019).

I. Determination that Defendant's Confession was a "Purported Confession"

The State first argues the trial court erred when it determined that Defendant's confession to the murder of Graham was a "purported confession." Specifically, the State argues that the trial court abused its discretion because the trial court was bound by this Court's prior decision regarding the validity of Defendant's confession. However, because we reverse the trial court for the reasons stated below, we decline to address this argument.

II. Newly Discovered Evidence

[1] The State next contends that the trial court abused its discretion when it granted Defendant a new trial. Specifically, the States argues that Defendant failed to prove the purported newly discovered evidence by a preponderance of the evidence. We agree.

> In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial.

State v. Beaver, 291 N.C. 137, 143, 229 S.E.2d 179, 183 (1976). It is *the defendant's burden* to "prov[e] by a preponderance of the evidence every fact essential to support the motion." N.C. Gen. Stat. § 15A-1420(c)(5).

> [A] new trial for newly discovered evidence should be granted with the utmost caution and only in a clear

> case, lest the courts should thereby encourage negligence or minister to the litigious passions of men. The defendant has the laboring oar to rebut the presumption that the verdict is correct and that he has not exercised due diligence in preparing for trial. Under the rule as codified, the defendant has the burden of proving that the new evidence could not with due diligence have been discovered or made available at the time of trial.

State v. Rhodes, 366 N.C. 532, 536-37, 743 S.E.2d 37, 40 (2013) (*purgandum*). We address the pertinent factors below.

A. Probably True

The trial court determined in conclusion of law 5 that the purported "newly discovered evidence was probably true" and that McCormick was a credible witness. While "[t]he trial court is in the best position to judge the credibility of a witness," *State v. Garner*, 136 N.C. App. 1, 14, 523 S.E.2d 689, 698 (1999), McCormick's testimony was internally inconsistent and contrary to his sworn affidavit. Although the trial court found McCormick's testimony credible, it is so contrary to the information contained in his affidavit that we cannot conclude that the information is probably true.

McCormick's sworn affidavit, which was admitted into evidence at the MAR hearing, contradicted his testimony at the hearing. McCormick's affidavit states that Shaw, Cox, and Bristow came to McCormick's house sweating and out of breath because they fled from a cab without paying the fare. Just two paragraphs later, McCormick's affidavit states that Shaw told McCormick they robbed and murdered Graham after they left McCormick's home that night.

At the hearing, McCormick testified that when Shaw, Cox, and Bristow arrived at his home, they were sweating and out of breath from "running from wherever they came from." Shaw, Cox, and Bristow allegedly ran from the murder scene "to [the McCormick's] house as soon as they did [the murder]." In addition, McCormick stated that Shaw told him they had jumped from the cab without paying the fare. But no explanation was provided concerning why Shaw, Cox, and Bristow did not pay Graham when Elliott had agreed to pay the fare.

Moreover, McCormick testified that his mother "was working graveyard [shift]" from 11:00 p.m. until 7:00 a.m., and that he remembered telling her to go to work that night because they were waiting for her to leave to then sell drugs. However, his affidavit indicates that his mother "stayed home from work" that evening.

When asked how long Shaw, Cox, and Bristow stayed at his house that night, McCormick responded, "[m]aybe five, ten minutes. My momma ran them off." McCormick then testified that Shaw did not tell him anything about Graham's murder that night because "[i]t was already the wee hours of the morning." However, finding of fact number 13 states that paramedics responded to the scene of Graham's murder at 7:19 p.m. According to McCormick's testimony, Shaw, Cox, and Bristow fled from Graham's cab to his home. The three were then at McCormick's home for at most ten minutes before his mother ran them off in "the wee hours of the morning." However, if McCormick's mother was working the graveyard shift as he testified, she could not have been home in "the wee hours of the morning" to run Shaw, Cox, and Bristow off. Accordingly, not only is McCormick's testimony probably not true, but it is entirely impossible to reconcile the discrepancies in the information provided by McCormick.

In light of McCormick's conflicting affidavit and inconsistent testimony, Defendant failed to demonstrate by a preponderance of the evidence that the information provided by McCormick is probably true.

B. Evidence in Existence at the Time of Trial and Due Diligence

"Newly discovered evidence is evidence which was in existence but not known to a party at the time of trial." *State v. Nickerson*, 320 N.C. 603, 609, 359 S.E.2d 760, 763 (1987). "Pursuant to N.C.G.S. § 15A–1415[(c)], newly discovered evidence must be unknown or unavailable to the defendant at the time of trial in order to justify relief." *State v. Wiggins*, 334 N.C. 18, 38, 431 S.E.2d 755, 767 (1993) (citation and quotation marks omitted). Thus, where "the purported newly discovered evidence was known or available to the defendant at the time of trial, the evidence does not meet the requirements of N.C.G.S. § 15A-1415(c)." *Rhodes*, 366 N.C. at 537, 743 S.E.2d at 40.

The trial court found that prior to the original trial, "Attorney Webb spoke to contacts 'in the street' who had provided information that led him to believe Defendant was not involved in the crime." Knowing this, Webb hired Investigator Palmer to speak with McCormick, however, McCormick never spoke with Investigator Palmer. The trial court stated in finding of fact 64 that "Investigator Palmer attempted to interview William McCormick but was unable to locate him." In finding of fact 65, the trial court found that "[h]ad Attorney Webb been able to locate and interview William McCormick at the time of trial, Webb would have called him to testify to the information contained in the affidavit."[1]

1. The trial court based its conclusion that the information from McCormick was newly discovered evidence, in part, on a finding that "the details of [McCormick's] testimony

Webb testified that he had made "contact through some of the people that [he] knew in the street who brought up the names of other guys that they thought had [assaulted Graham] . . . the McCormicks names popped up in those conversations." Despite having this information, Webb failed to utilize available procedures to secure McCormick's statement or testimony. Specifically, Webb did not (1) issue a subpoena, (2) request a material witness order, (3) request a recess, (4) make a motion to continue, (5) alert the trial court to the existence of this information, or (6) otherwise preserve this information in the record at trial. *See State v. Smith*, 130 N.C. App. 71, 77, 502 S.E.2d 390, 394 (1998) (dismissing defendant's argument because the defendant did not avail himself of the methods to procure a witness at trial).

Webb could have secured McCormick's attendance to testify at trial by subpoena. *See* N.C. Gen. Stat. § 15A-801. In addition, Webb failed to file a motion for a material witness order. A material witness order is

> an order assuring the attendance of a material witness at a criminal proceeding. This material witness order may be issued when there are reasonable grounds to believe that the person whom the State or a defendant desires to call as a witness in a pending criminal proceeding possesses information material to the determination of the proceeding and may not be amenable or responsive to a subpoena at a time when his attendance will be sought.

N.C. Gen. Stat. § 15A-803(a). This method compels a witness to "attend the hearing by subpoena, or if the court considers it necessary, by order for arrest." N.C. Gen. Stat. § 15A-803(g). Therefore, if Webb would have filed a motion for a material witness order, McCormick could have been compelled to attend and testify at Defendant's original trial despite any interference from his mother.

Further, McCormick was actually present at Defendant's trial. Knowing this, Webb failed to speak with McCormick despite knowing that McCormick may have information concerning Graham's death. In addition, Webb failed to alert the trial court to the existence of this information, failed to file a motion to continue, request a recess, or otherwise take steps to procure the information.

---

were not known at the time of trial." The trial court's wording is troubling because this is generally true of all testimony – practitioners and judges do not know what a witness's testimony will be until the witness actually testifies. Under the trial court's interpretation of newly discovered evidence, virtually any information not originally introduced at trial could qualify as newly discovered evidence, even though it could have been discovered through other methods or witnesses.

In similar cases, we have rejected a defendant's motion for a new trial on the basis of newly discovered evidence when the defendant had an opportunity at trial to present the evidence through other methods, or the defendant did not use the proper procedures to preserve the evidence.

In *State v. Beaver*, the defendant was convicted of first-degree burglary and sentenced to life imprisonment. *Beaver*, 291 N.C. at 138, 229 S.E.2d at 180. The defendant filed a motion for a new trial on the basis of newly discovered evidence. The defendant argued that he learned during jury deliberations that a witness was located prior to trial, and that this witness would testify that defendant was living in the house which was burglarized. *Id.* at 142, 229 S.E.2d at 182. Our Supreme Court found that the witness' testimony "would only have been cumulative and corroborative[,]" the defendant "had ample opportunity to examine" the detectives who located the witness, and the defendant should have filed an affidavit prior to trial stating that the witness was important and material. *Id.* at 144, 229 S.E.2d at 183.

Furthermore, in *State v. Rhodes*, the defendant was convicted of possession with intent to manufacture, sell, or deliver cocaine and possession of drug paraphernalia. *Rhodes*, 366 N.C. at 534, 743 S.E.2d at 38. The defendant's father testified at trial but invoked his Fifth Amendment protections when asked whether the contraband belonged to him. *Id.* at 537, 743 S.E.2d at 40. After trial, the defendant's father made an out-of-court statement that the drugs belonged to him. *Id.* at 538, 743 S.E.2d at 40.

Our Supreme Court determined that this information was not newly discovered evidence because it "was not evidence which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time." *Id.* at 538, 743 S.E.2d at 40 (citation and quotation marks omitted). In making this conclusion, our Supreme Court determined that the evidence could have been presented at trial through a different line of questioning or even through the examination of another witness. *Id.* at 538, 743 S.E.2d at 40.

Accordingly, McCormick's testimony is not newly discovered evidence because it was not "unknown or unavailable to the defendant at the time of trial." *Wiggins*, 334 N.C. at 38, 431 S.E.2d at 767.

Closely related is the issue of due diligence. "Due diligence is defined as '[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.' " *State v. Pezzuto*, No. COA02-569, 2003 WL 21037894, at *3 (N.C. Ct. App. May 6, 2003) (quoting Black's Law Dictionary 468 (7th ed.1999)) (unpublished).

> When the information presented by the purported newly discovered evidence was known or available to the defendant at the time of trial, the evidence does not meet the requirements of N.C.G.S. § 15A-1415(c). *Wiggins*, 334 N.C. at 38, 431 S.E.2d at 767. In *State v. Powell* we found no error in a trial court's conclusion that a defendant failed to exercise due diligence when "the defendant knew of the statement of [the witness] during the trial" but failed to procure her testimony. 321 N.C. at 371, 364 S.E.2d at 336. We also agreed there was no newly discovered evidence when a defendant learned after trial that his blood sample had been destroyed before trial, yet he made no inquiry about the blood sample before or during trial. *State v. Dixon*, 259 N.C. 249, 250-51, 130 S.E.2d 333, 334 (1963) (*per curiam*). In another case we agreed there was no newly discovered evidence when the defendant learned during his trial that two detectives had located his former roommate before the trial began. *Beaver*, 291 N.C. at 144, 229 S.E.2d at 183. We wrote: "Defendant had ample opportunity to examine [the detectives] as to their knowledge of the whereabouts of [his former roommate]. This he failed to do." *Id.* We further wrote: "[I]f [the] defendant considered [the former roommate] an important and material witness, he should have filed an affidavit before trial so stating and moved for a continuance to enable him to locate this witness. This he did not do." *Id.*

Rhodes, 366 N.C. at 537, 743 S.E.2d at 40.

Conclusion of law 13 states that "Defendant used due diligence and proper means to procure the testimony of William McCormick at Defendant's original trial." For the reasons stated above concerning evidence unknown to Defendant, Defendant failed to exercise due diligence in procuring McCormick's testimony.

C. Material, Competent and Relevant Information

The State further argues that the trial court abused its discretion when it concluded that McCormick's testimony and affidavit was "competent, material and relevant. [Because i]t identifies the actual perpetrators of the offense and exculpates the Defendant." We agree.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2019). "Hearsay

is not admissible except as provided by statute or by the[] rules" of evidence. N.C. Gen. Stat. § 8C-1, Rule 802 (2019). McCormick's testimony concerning Shaw's purported statements are inadmissible hearsay. Rule 803 of the North Carolina Rules of Evidence establishes exceptions to the general exclusion of hearsay evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 803 (2019).

The trial court made the following conclusion of law concerning Shaw's statements:

> 9. After careful scrutiny, the court concludes that the testimony of William McCormick about Robert Shaw's statement regarding the details of Shaw, Bristow and Cox assaulting the victim is admissible evidence under Rule 803(24). First, the State is on notice that Defendant would offer such evidence at trial. Second, this hearsay evidence is not specifically covered by any other exception in Rule 803. Third, the evidence possesses circumstantial guarantees of trustworthiness equivalent to other hearsay exceptions because it constitutes an admission of criminal conduct by Shaw, is consistent with events actually observed by William McCormick the day before, when Shaw and the other youths arrived at McCormick's house out of breath having jumped and run from a cab, and is consistent with known circumstances of the case, including that the victim was assaulted by more than one young male person. Fourth, the evidence is material to the case. Fifth, the evidence is more probative on the issue of whether Shaw, Bristow and Cox, rather than Defendant, were the actual perpetrators of these crimes than any other evidence procurable by reasonable efforts. Defendant cannot reasonably be expected to procure the in-court confession of Shaw that Shaw himself is guilty of robber and first degree murder. Sixth, admission of the evidence of Shaw's statements will best serve the purposes of the Rules of Evidence and the interests of justice. *State v. Smith*, 315 N.C. 76 (1985).

Rule 803(24) of the North Carolina Rules of Evidence allows the admission of statements that are

> not specifically covered by any of the foregoing [hearsay] exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B)

> the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

N.C. Gen. Stat. § 8C-1, Rule 803(24). However, "Rule 803(24) is disfavored and should be invoked very rarely and only in exceptional circumstances." *Strickland v. Doe*, 156 N.C. App. 292, 299, 577 S.E.2d 124, 130 (2003) (citation and quotation marks omitted).

> Because of the residual nature of the Rule 803(24) hearsay exception and the Commentary's warning that this exception does not contemplate an unfettered exercise of judicial discretion, evidence proffered for admission pursuant to N.C.G.S. § 8C-1, Rule 803(24), must be carefully scrutinized by the trial judge within the framework of the rule's requirements.

State v. Smith, 315 N.C. 76, 91-92, 337 S.E.2d 833, 844 (1985) (*purgandum*).

For evidence to be admissible under Rule 803(24), the trial court must find six factors in the affirmative: (1) proper notice had been given; (2) the hearsay is not specifically covered elsewhere; (3) the statement is trustworthy; (4) the statement is material; (5) the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts; and (6) the interests of justice will be served by its admission. *Id.* at 92-96, 337 S.E.2d at 844-847. Defendant failed to satisfy the notice requirement, and so we address only that factor in our analysis below.

> When hearsay testimony is sought to be admitted as substantive evidence under Rule 803(24), the proponent must first provide written notice to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement. The hearsay statement may not be admitted unless this notice (a) is in writing; and (b) is provided to the adverse party sufficiently in advance of offering it to allow him to prepare to meet it; and (c) contains (1) a statement of the proponent's intention to offer the hearsay testimony, (2) the particulars of the hearsay testimony, and (3) the name and address of the declarant. Thus, a trial judge must make the initial determination that proper notice was duly given and must include that determination in the record; detailed findings of fact are

> not required. Should the trial judge determine that notice was not given, was inadequate, or was untimely provided, his inquiry must cease and the proffered hearsay statement must be denied admission under Rule 803(24).

Id. at 92, 337 S.E.2d at 844 (emphasis added) (quotation marks omitted).

Here, the trial court found that "the State is on notice that Defendant would offer such evidence at trial." However, there is no evidence in the record that Defendant filed a proper notice of intent to offer hearsay evidence pursuant to Rule 803(24) prior to hearing the motion for appropriate relief. Thus, Defendant failed to satisfy the first requirement of Rule 803(24), and the trial court abused its discretion when it concluded the written notice requirement had been satisfied. *See id.* at 92, 337 S.E.2d at 844 ("Should the trial judge determine that notice was not given, was inadequate, or was untimely provided, his inquiry must cease and the proffered hearsay statement must be denied admission under Rule 803(24).").

III. Constitutional Violation

[2] The State also argues that the trial court erred when it concluded that Defendant's due process rights would be violated if he were not allowed to present McCormick's testimony at a new trial. We agree.

"The standard of review for alleged violations of constitutional rights is *de novo*. A violation of the defendant's rights under the Constitution of the United States is prejudicial unless we find that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." *State v. Guy*, 262 N.C. App. 313, 317, 822 S.E.2d 66, 72 (2018) (*purgandum*).

The Sixth Amendment to the United States Constitution, in pertinent part, states, "[i]n criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Sixth Amendment applies to the State of North Carolina by way of the Fourteenth Amendment to the United States Constitution, which states, in part,

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

Rather than relying on traditional due process principles to determine whether to grant a new trial for newly discovered evidence, this Court has previously applied the seven factors required for a new trial as set forth in *Beaver*. *See State v. Hoots*, 76 N.C. App. 616, 618, 334 S.E.2d 74, 75-76 (1985) ("Defendant contends that due process requires a new trial whenever newly discovered exculpatory evidence in the form of sworn testimony by a confessed perpetrator of the offense is corroborated by independent evidence. This contention is without merit. The standard for granting a new trial is set out in [*Beaver*.]").

Here, the trial court stated in conclusion of law 18, "In addition, as an independent ground for decision, denying Defendant the opportunity to present all of the newly discovered evidence to a trier of fact would, under the circumstances of this case, violate Defendant's federal and state constitutional rights to due process of law."

However, Defendant has failed to satisfy the *Beaver* factors discussed above, and Defendant is not entitled to a new trial. Thus, the trial court erred in concluding that Defendant's constitutional rights would be violated if he did not have the opportunity to present the purported newly discovered evidence.

Conclusion

For the reasons stated herein, we reverse the trial court's order granting a new trial.

REVERSED.

Judge BRYANT concurs.

Judge DIETZ concurs by separate opinion.

DIETZ, Judge, concurring.

This case arrived at our Court on the wrong legal ground for post-conviction relief. When a defendant who already has been convicted of a crime claims that there is evidence of his innocence, his post-conviction options branch into two paths, depending on the availability of that evidence at the time of trial.

If the evidence of innocence *could not* have been discovered in the exercise of due diligence at the time of trial, the defendant can bring a claim under N.C. Gen. Stat. § 15A-1415(c), which addresses newly discovered evidence.

By contrast, if the evidence *could* have been discovered in the exercise of due diligence at the time of trial, but was not, the defendant may pursue a claim for ineffective assistance of counsel under N.C. Gen. Stat. § 15A-1415(b)(3).

This case follows the second path. Reid's trial counsel learned "from the street" that William McCormick had information that implicated other people, but not Reid, in the crime. Reid's counsel even hired an investigator to speak to McCormick. But, according to Reid's counsel, "we couldn't get to him." This was so, Reid's counsel explained, because McCormick's mother did not want him to get involved with the investigation.

As the majority correctly observes, the law provides many options for a defendant in this situation to secure the testimony of the evasive witness. Indeed, McCormick was sitting in the courtroom during Reid's trial, yet Reid's counsel took no steps to obtain his testimony despite knowing that it likely was exculpatory. As a result, the jury never heard the testimony that McCormick ultimately provided years later.

Still, that fact does not make McCormick's testimony, when it finally came to light, newly discovered evidence under our post-conviction jurisprudence. Rather, the failure to secure this testimony at the time of trial implicates Reid's constitutional right to the effective assistance of counsel.

I therefore concur in the majority's judgment but note that this Court's holding does not bar Reid from seeking post-conviction relief on other grounds. The procedural bar on successive motions for appropriate relief should not apply if the basis for one claim did not become apparent until the litigation of another.

STATE OF NORTH CAROLINA
v.
MICHAEL RAY WATERFIELD, DEFENDANT

No. COA19-427

Filed 20 October 2020

1. Hunting and Fishing—fishing—public welfare offenses—strict liability—unattended gill nets and crab pots

The marine fisheries regulations that defendant was charged with violating—rules regarding unattended gill nets and crab pots—were strict liability offenses where the language of the relevant statute criminalizing violations of rules adopted by the Marine Fisheries Commission (N.C.G.S. § 113-135) did not include an intent element, and where these were "public welfare" offenses of the type which our Supreme Court has held to be strict liability offenses. The Court of Appeals was bound by controlling precedent; however, it observed the unfairness that can result from these strict liability offenses, such as here, where defendant had to leave his gill nets due to sickness caused by his throat cancer and was in a car accident on his way home.

2. Criminal Law—jury instructions—strict liability offense—willfulness alleged in indictment

Where the State charged defendant with a strict liability offense but alleged in the indictment that defendant acted willfully, the State was nonetheless not required to prove willfulness, and the trial court properly did not include willfulness as an element of the crime in its jury instructions.

Appeal by Defendant from judgment entered 7 November 2018 by Judge Marvin K. Blount III in Perquimans County Superior Court. Heard in the Court of Appeals 31 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy Bircher, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for the Defendant.

DILLON, Judge.

One of the most fundamental concepts in criminal law is *mens rea*, the guilty mind. Historically, our society punished people for committing a crime for committing certain acts if they had some intent to commit the act.

Over time, this *mens rea* requirement has loosened. We have seen the rise of *strict* liability crimes, crimes that do not have an intent element. One class of crimes where strict liability has flourished is so-called regulatory crimes, meaning criminal offenses that have no common law analogue and are enacted to encourage behavior that advances the public welfare.

This case involves several of these regulatory crimes.

The General Assembly enacted legislation authorizing the Marine Fisheries Commission and its Director to regulate coastal fishing. The legislature also provided that any violation of a Commission rule was a misdemeanor criminal offense. Pursuant to its authority, the Commission enacted rules prohibiting fisherman from leaving gill nets and crab pots unattended for a certain amount of time.

Defendant Michael Waterfield, a fisherman, was convicted of violating these regulations after he left gill nets and crab pots unattended for too long. Defendant argued that he is not criminally liable because he lacked any *mens rea* – or intent – to break the Commission rule. He claims he was sick and had to leave his equipment.

As explained below, Defendant has presented a series of compelling arguments for why the proliferation of these strict liability crimes undermines foundational principles of our State's criminal law jurisprudence. But as an intermediate appellate court, we are bound to follow controlling precedent. Under that precedent, these offenses are strict liability crimes that do not require the State to prove intent. If the law concerning these sorts of strict liability regulatory offenses should be changed, that change must come from our Supreme Court or from our General Assembly.

I. Facts and Procedural History

Defendant is a licensed commercial fisherman. In late 2016, a Marine Patrol officer was on boat patrol and came across an unattended gill net. The officer identified the net as belonging to Defendant because it had his name and boat number on it.

A marine fisheries proclamation in effect at the time required a person operating this type of gill net to remain within 100 yards of the net.

The officer observed the area but did not see anyone in the vicinity of the net.

Somewhere between thirty minutes and one hour later, Defendant approached the officer and asked why the officer was near his net. The officer then gave Defendant a citation for an unattended gill net.

An hour later, the officer found crab pots with markers identifying them as belonging to Defendant. The officer pulled up one of the pots and saw that there were dead and decomposing crabs inside.

Several days later, the officer returned Defendant's crab pots to the water with plastic tags on the pots so that they could not be opened without cutting the tags off. The officer returned to check on the pots seven days later and found that all the tags were still in place, indicating that the crab pots had not been fished.

The officer cited Defendant for two violations of marine fisheries regulations: one for leaving crab pots in the water for more than five consecutive days and another for leaving crab pots containing edible species not fit for human consumption. The officer used a form citation for these offenses, a form that contained language that Defendant was being charged with committing these regulatory violations "unlawfully and willfully."

Defendant was convicted of all charges in district court and appealed to superior court. During his jury trial in superior court, Defendant explained that, as for the unattended gill net, he was struggling with throat cancer and, after setting out his nets, he got sick and had to go home. He further explained that he got into an automobile accident on the way home. As a result of these unfortunate events, Defendant was unable to return and retrieve one of his nets.

As for the crab pots, Defendant testified that he did fish those pots and that he "cut the tags off," despite the officer's testimony to the contrary. On cross-examination, Defendant acknowledged that he had a number of past violations for similar failures to retrieve gills nets or crab pots. He explained that, given the scope of marine fisheries regulations, "[i]f you go out and fish, you gonna get tickets."

Because there were no pattern instructions for these regulatory offenses, the trial court proposed to instruct the jury on the elements of the offenses by tracking the specific language in the applicable regulations or proclamations. The regulations did not include any intent element. Defendant did not object or request any additional instructions.

After closing arguments, the trial court asked Defendant's counsel, "is there a contention that the law is something different than what has been provided to the Court?" Defense counsel responded that he was "just arguing the charging document," which presumably was a reference to the use of the phrase "unlawfully and willfully" in the citation. The trial court then stated, "What I've been provided, I guess, from the law is the elements of the crime do not require willfulness." The trial court then instructed the jury using the language of the applicable provisions and did not instruct the jury that these criminal offenses required proof of any form of criminal intent.

The jury convicted Defendant of the unattended gill net offense and the offense of leaving crab pots in the water for more than five days. The jury acquitted him of the second crab pot violation. The trial court consolidated the two convictions for judgment and sentenced Defendant to 20 days in jail, suspended for one year of supervised probation, and a $200 fine. Defendant appealed.

II. Analysis

A. Strict liability for the charged offenses

[1] Defendant first argues that the trial court committed plain error by failing to instruct the jury that the State must prove his violations were willful. He contends that the offenses with which he was charged must include some form of *mens rea* and cannot be strict liability offenses.

Defendant concedes that these arguments were not preserved by request or objection at trial and thus we review only for plain error. N.C. R. App. P. 10(a)(4); *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Plain error should be "applied cautiously and only in the exceptional case" where the errors "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.* at 516-17, 723 S.E.2d at 333.

Whether a particular offense is a strict liability offense is a question of law that this Court reviews *de novo*. *See State v. Watterson*, 198 N.C. App. 500, 503, 679 S.E.2d 897, 899 (2009). As a leading criminal law treatise observes, "[f]or several centuries (at least since 1600) the different common law crimes have been so defined as to require, for guilt, that the defendant's acts or omissions be accompanied by one or more of the various types of fault (intention, knowledge, recklessness or—more rarely—negligence); a person is not guilty of a common law crime

without one of these kinds of fault." 1 Wayne R. LaFave, Substantive Criminal Law § 5.5, *Strict Liability* (3d ed. 2017). "But legislatures, especially in the 20th and 21st centuries, have often undertaken to impose criminal liability for conduct unaccompanied by fault." *Id.*

Our General Assembly is among the state legislatures that began imposing strict liability over the last century-and-a-half. When challenges to these strict liability crimes arrived at our Supreme Court, that Court held that it is "within the power of the Legislature to declare an act criminal irrespective of the intent of the doer of the act. The doing of the act expressly inhibited by the statute constitutes the crime." *State v. Hales*, 256 N.C. 27, 30, 122 S.E.2d 768, 771 (1961). The determination of whether "criminal intent is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute in view of its manifest purpose and design." *Id.*

Our Supreme Court later refined these principles in the context of what are often called "public welfare" crimes. *See Watson Seafood & Poultry Co. v. George W. Thomas, Inc.*, 289 N.C. 7, 13, 220 S.E.2d 536, 541 (1975). In *Watson*, the Court addressed a traffic law prohibiting passing another vehicle at a railway crossing or highway intersection. *Id.* The Court explained that "it is not a violation of due process to punish a person for certain crimes related to the public welfare or safety even when the person is without knowledge of the facts making the act criminal. This is particularly so when the controlling statute does not require the act to have been done knowingly or willfully." *Id.* at 14, 220 S.E.2d at 541-42 (citations omitted).

The Court focused on several aspects of the traffic law that supported a strict-liability interpretation. First, the Court noted that the General Assembly did not include an express intent element, such as the words "knowingly" or "willfully" often found in criminal statutes. *Id.* at 15, 220 S.E.2d at 542. Second, the Court observed that the law was a "safety statute enacted by the Legislature for the public's common safety and welfare." *Id.* The Court also explained that the offense fell into a category for which the punishment is typically "a small fine." *Id.* Finally, the Court noted that proving "intent or guilty knowledge would make it impossible to enforce such laws in view of the tremendous number of petty offenses growing out of the host of motor vehicles upon our roads." *Id.* at 14, 220 S.E.2d at 542.

Cases from this Court have applied the *Watson* reasoning to many different "public welfare" offenses, including offenses related to conservation of wildlife. *See, e.g.*, *State v. Ballance*, 218 N.C. App. 202, 217,

720 S.E.2d 856, 867 (2012). Applying that precedent here, if the offenses with which Defendant was charged were contained entirely within our General Statutes, we could readily hold that these are strict liability crimes.

The State charged Defendant with violating a marine fisheries proclamation prohibiting "unattended gill nets with a stretched mesh length of 3 inches through 3 ¾ inches" and a marine fisheries regulation making it "unlawful to leave pots in any coastal fishing waters for more than five consecutive days, when such pots are not being employed in fishing operations, except upon a timely and sufficient showing of hardship." *See* 15A NCAC 3I.0105(b); Proclamation M-23-2016.

These offenses are public welfare laws designed to protect our marine fisheries; they carry minimum punishments, in most cases resulting only in a fine; they are the type of routine, minor offense that could prove impossible to enforce if the State had to gather evidence of intent; and, most importantly, the General Assembly easily could have included an intent element for these offenses but did not do so. All of these factors weigh strongly in favor of strict liability.

But this case is not so simple. Here, our General Assembly did not enact a self-contained criminal law—it enacted legislation *authorizing the Marine Fisheries Commission* to regulate coastal fishing and then provided that violations of Commission regulations could be punished as a low-level misdemeanor. N.C. Gen. Stat. §§ 113-182; 113-135 (2016). The legislature also permitted the Commission to delegate to the Fisheries Director the authority to issue proclamations that are, in effect, Commission regulations. N.C. Gen. Stat. § 113-221.1. As a result of this statutory delegation, the General Assembly could not know what particular conduct would be criminalized by this statute; that depends on what the Marine Fisheries Commission and its director choose to regulate.

Defendant contends that this is the fatal flaw in the State's case. He asserts that there "is nothing in the context of the enabling statutes which suggests it was the 'manifest purpose and design' of the General Assembly" to impose strict liability. After all, the General Assembly did not even know what rules might one day be created under this delegation of authority.

But, to be fair, the so-called enabling statute—the one delegating this regulatory authority to the Commission—is not the key place to look. The operative statute is N.C. Gen. Stat. § 113-135, which criminalizes the conduct at issue: "Any person who violates any provision of this

Subchapter or any rule adopted by the Marine Fisheries Commission or the Wildlife Resources Commission, as appropriate, pursuant to the authority of this Subchapter, is guilty of a misdemeanor . . . ." N.C. Gen. Stat. § 113-135(a).

The General Assembly could have included an intent element in this criminal provision. For example, the legislature could have imposed criminal liability on any person who *willfully* violates the Commission's rules. Or the legislature could have established a default *mens rea*, for example by stating that if a rule does not provide a different level of intent, the defendant must be shown to have acted willfully to establish a violation of the rule.

These examples are not abstract ideas—as the parties point out in their briefing, the General Assembly has contemplated this sort of legislation before. Indeed, one proposed bill was entitled "An act to make changes to future criminal laws related to regulatory offenses . . . that do not specify criminal culpability" and would have created a default *mens rea* of recklessness for regulatory crimes like the ones at issue in this case. *See* H.B. 1010 § 2, 2019 Session (filed 25 April 2019). That the legislature has so many means to include an intent element in these criminal offenses, but still chose not to do so, weighs in favor of concluding these are strict liability offenses.

Moreover, other accompanying statutes support an interpretation that does not include an intent element. For example, the statute authorizing the Fisheries Director to issue proclamations states that "persons who may be affected by proclamations issued by the Fisheries Director are under a duty to keep themselves informed of current proclamations" and it is "no defense in any criminal prosecution for the defendant to show that the defendant in fact received no notice of a particular proclamation." N.C. Gen. Stat. § 113-221.1(c). This statutory language demonstrates that the General Assembly contemplated the proof that would be required in criminal prosecutions of these regulations. Although the legislature chose to address certain issues, such as the obligation to know the law, it chose not to enact an intent element.

Moreover, there is nothing particularly unusual about the General Assembly's decision not to include an intent element for these offenses. These regulatory offenses have no common law analogue; they are designed to cultivate and conserve our State's marine resources. These types of "public welfare" offenses often do not include an intent element. This is because a violation of these offenses "impairs the efficiency of controls deemed essential to the social order as presently constituted."

Morissette v. United States, 342 U.S. 246, 256 (1952). With the rise of the administrative state and corresponding regulatory regimes, courts across our nation began construing these regulatory crimes "which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime." *Id.*

Equally important, violations of the Marine Fisheries Commission regulations and proclamations are minor criminal offenses—low-level misdemeanors that will typically result in a fine and will lead to an active sentence only in exceedingly rare cases for defendants with many prior convictions. N.C. Gen. Stat. § 113-135.

Finally, these offenses fall within the category of regulatory crimes for which an intent element could "make it impossible to enforce such laws in view of the tremendous number of petty offenses." *See Watson*, 289 N.C. at 14, 220 S.E.2d at 542. Requiring the State to launch an investigation into every person who unlawfully leaves a crab pot or gill net unattended and to gather sufficient evidence to prove beyond a reasonable doubt that the violation was willful could render enforcement of these minor offenses impractical for the State. This, too, is a key factor in why our Supreme Court and other courts have interpreted the lack of an express intent element in these regulatory crimes as evidence of an intent to impose strict liability. *Id.*; *see also Morissette*, 342 U.S. at 256.

In sum, we hold that the criminal offenses charged in this case under N.C. Gen. Stat. § 113-135 are strict liability regulatory offenses that do not require the State to prove intent. But we note that our holding is not an endorsement of these strict liability crimes. Defendant's appellate brief lays out in compelling detail why our State's criminal laws historically have required an intent element, and why the ever-expanding morass of regulatory crimes is undermining the fundamental notion that *mens rea* is a necessary component of our State's criminal jurisprudence. But we "lack the authority to change the law on the ground that it might make good policy sense to do so." *Fagundes v. Ammons Dev. Grp., Inc.*, 251 N.C. App. 735, 739, 796 S.E.2d 529, 533 (2017).

B. Failure to instruct on willfulness

[2] Defendant next argues that, even if the charged offenses are strict liability crimes, the State was required to prove willfulness in this case because the indictment alleged that Defendant acted willfully. Again, Defendant concedes that he did not raise this argument in the trial court. We therefore review for plain error.

There is logical appeal to Defendant's argument—after all, if the State charges a defendant with willfully violating a regulation, should

the State not be required to prove that charge? But we are again constrained by controlling precedent. What happened in this case has happened before. In *State v. Clowers*, the State charged the defendant with willfully driving while impaired because "the charging officer did not cross out the word 'willfully' on the uniform citation" although, as in this case, "willfulness is not an element of the crime." 217 N.C. App. 520, 529, 720 S.E.2d 430, 437 (2011). The defendant presented a defense based on the State's failure to prove willfulness and requested a jury instruction on willfulness. The trial court denied that request because willfulness was not an essential element of the charged offense.

This Court found no error in *Clowers*, holding that "the inclusion of 'willfully' was beyond the essential elements of the offense" and thus the trial court properly disregarded it as "surplusage." *Id.* at 529-30, 720 S.E.2d at 437. The Court further explained that the trial court *could not* have instructed the jury on willfulness because the trial court's duty is to instruct the jury on the law and "that instruction would not have been supported by law." *Id.*

The facts in *Clowers* are indistinguishable from those in this case. We are therefore constrained to reject this argument. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). Accordingly, we find no error in the trial court's instructions to the jury.

III. Conclusion

We find no error in the trial court's judgments.

NO ERROR.

Judges DIETZ and YOUNG concur.

MARY COOPER FALLS WING, PLAINTIFF
v.
GOLDMAN SACHS TRUST COMPANY, N.A., ET AL., DEFENDANTS

RALPH L. FALLS, III, ET. AL., PLAINTIFF
v.
GOLDMAN SACHS TRUST COMPANY, N.A., ET AL., DEFENDANTS

No. COA19-1007

Filed 20 October 2020

1. Appeal and Error—interlocutory ruling—substantial right—depletion of trust—claim to determine rightful beneficiaries

In a case challenging amendments made to a trust and to determine the trust's rightful beneficiaries, plaintiffs were entitled to immediate review of an interlocutory ruling, in which the trial court allowed defendant's motion to pay costs (ordering the trustee to distribute trust assets to some purported beneficiaries but not others), based on their assertion that they would be deprived of a substantial right absent review because more than two million dollars had already been paid out of the trust and the ownership of the assets was in dispute.

2. Trusts—pending litigation—determination of rightful beneficiaries—trust validity not disputed—duty of trustee to remain neutral—distribution improper

In an issue of first impression, where plaintiffs did not attack the underlying validity of the trust, but disputed the rightful beneficiaries after six amendments were made to the trust, the trial court erred by ordering the trustee to make distributions to some putative beneficiaries but not others for costs in defending the trust, and the matter was remanded for entry of an order allowing a motion to freeze administration of the trust that was filed by one of the plaintiffs. Since the trust itself was not under attack, the trustee breached its duty of neutrality by distributing trust assets, after becoming aware of plaintiffs' claims, to some of the competing beneficiaries for expenses and legal fees incurred in opposing plaintiffs' claims.

Appeal by plaintiffs from order entered 20 May 2019 by Judge Edwin G. Wilson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 24 September 2020.

Womble Bond Dickinson (US) LLP, by Johnny M. Loper, Elizabeth K. Arias and Jesse A. Schaefer, for plaintiff-appellant Mary Cooper Falls Wing.

Penry Riemann PLLC, by J. Anthony Penry, for plaintiff-appellant Ralph Falls, III.

Mullins Duncan Harrell & Russell PLLC, by Allison Mullins, Alan W. Duncan, and Hillary M. Kies, for defendant-appellee Dianne C. Sellers.

Ellis & Winters LLP, by Leslie C. Packer, Alex J. Hagan and Michelle A. Liguori, for defendant-appellees, Louise Falls Cone, Toby Cone, Gillian Falls Cone, and Katherine Lenox Cone.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Eva G. Frongello, James K. Dorsett, III, and J. Mitchell Armbruster for defendant-appellant Goldman Sachs Trust Company, N.A.

TYSON, Judge.

I. Background

Ralph Lane Falls Jr. ("Decedent") died on 11 May 2015 at the age of seventy-four. Decedent was survived by his wife, Dianne C. Sellers ("Sellers"), and his three adult children from his first marriage, daughter Mary Cooper Falls Wing ("Wing"), son, Ralph Lane Falls III (Falls III), and daughter, Louise Falls Cone ("Cone"). Decedent is also survived by Falls III's three children and by Cone's two children and her husband. Goldman Sachs Trust Company ("Goldman Sachs") is the acting trustee of Decedent's trust ("Trust").

Decedent created a revocable Trust as trustor in August 2011. Decedent signed as both grantor and trustee in the Trust instrument. Wells Fargo Bank, N.A. was designated as the successor trustee. Wing, her brother, Falls III, and two of his children were named and designated as the beneficiaries of 90% of the Trust's assets. The Trust allocated 40% of the *res* upon Decedent's death to Wing, 40% to Falls III, and 5% each to two of Falls III's children. Cone's two children were to receive 5% each, to equal 100% of the *res* ("Original Beneficiaries"). Decedent's other daughter, Louise Cone, her husband, and Sellers were not designated as beneficiaries nor listed to receive any distributions of assets or income from the Trust.

Decedent executed his September 2012 will, prepared by a different attorney from the Trust's drafter, one month prior to scheduled surgery to remove three brain tumors. Decedent's September 2012 will named and appointed Falls III as trustee "of each trust," and Wing as his

successor trustee. Decedent repeatedly acknowledged his desire for his property to be divided equally between his three children, Wing, Falls III, and Cone.

Decedent underwent brain surgery in October 2012. After surgery, he began to suffer a series of serious physical and mental health problems, resulting in recurring hospitalization and rehabilitative care. For the remainder of his life, Decedent relapsed into heavy drinking, experienced depression, manic episodes, and complications with bipolar disorder.

After removal of the brain tumors and beginning in December 2012 until 10 December 2014, Decedent intermittently executed six amendments ("purported amendments") to the 2011 Trust.

The first amendment in December 2012 added Sellers as successor trustee and Falls III as her successor trustee. Falls III's share was reduced to 30%, Wing's share was eliminated to 0%, Cone was named as a beneficiary of 30%, and the four previously named grandchildren's shares were increased to 10% each.

The second amendment in January 2013 left Sellers as the first successor trustee. Successor trustee duties were given to Falls III on behalf of his children, and to Cone and her husband as subsequent successor trustees on behalf of their children. Falls III and Cone were named to receive 30% each, Wing's share remained at 0%, and the four grandchildren's shares remained at 10% each.

The third amendment in January 2014 named Goldman Sachs as successor trustee. Falls III's and Cone's shares were reduced to 20% each, and each of the four grandchildren's shares was increased to 15%.

In February 2014, the Trust was amended again. Goldman Sachs remained successor trustee, and Sellers and Cone were added as successor trustees after Goldman Sachs. Goldman Sachs was given discretionary power to distribute to Cone, her husband and to Sellers. Cone's share increased to 35% with her husband, Cone's two daughters' share increased to 20% each, Sellers was given 25%. Wing, Falls III, and his children are not mentioned in this amendment.

The Trust was again amended in July 2014. This amendment continued Goldman Sachs' discretionary distributions to Sellers and Cone, and Sellers and Cone were given the power to remove Goldman Sachs as trustee.

The sixth and final amendment, entitled the "Fifth Amendment" was executed on 10 December 2014. That same day, Sellers and Decedent

applied for a marriage license and were married. This amendment gave 25% to Sellers, now as Decedent's wife, 35% to Cone and her husband, and 20% each to Cone's two children. An entire section benefits Sellers as a surviving spouse. Cone and her husband are designated to take Sellers' 25%, should Sellers predecease Decedent. Wing, Falls III, and his children are not mentioned in the document.

These amendments did not revoke the Trust nor create a new trust, and each amendment affirmatively restated and reaffirmed all terms and provisions of the Trust, not expressly amended.

Decedent died on 11 May 2015. On 12 June 2015, Goldman Sachs paid distributions from the Trust to Sellers and Cone pursuant to the Trust's Fifth Amendment. In 2016, Wing and Falls III filed claims and challenged the validity of the purported amendments and gave Goldman Sachs notice of their claims. Goldman Sachs continued making distributions, despite being on notice the amendments were challenged and that Sellers and Cone were not named beneficiaries under the original Trust.

Sellers and Cone filed a Joint Motion to Pay Defense Cost ("Motion to Pay") to direct Goldman Sachs to pay the cost of "defending the Trust as amended" on 6 February 2019. Wing filed an amended Motion to Freeze Administration of Revocable Trust until Beneficiaries are Determined or, alternatively, to Pay Defense Costs for ALL Purported Beneficiaries ("Motion to Freeze"). Goldman Sachs did not independently seek instructions on whether to make distributions to any of the purported claimants or seek an interpleader action for the Trust *res*. *See* N.C. Gen. Stat. § 1A-1, Rule 22(a) (2019) (Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims expose or may expose the plaintiff to double or multiple liability . . . . A defendant exposed to similar liability may obtain such interpleader by way of crossclaim or counterclaim.).

The trial court granted Defendant's Motion to Pay and denied Wing's Motion to Freeze on 20 May 2019. The order does not contain a Rule 54(b) certification that the order is immediately appealable. *See* N.C. R. App. P. 54(b). Plaintiff timely appealed from the superior court's order.

II. Interlocutory Jurisdiction

[1] Wing argues this Court possesses jurisdiction over this interlocutory appeal pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3) (2019).

> Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to

> appellant if not corrected before appeal from final judgment . . . Essentially a two-part test has developed[:] the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment.

Goldston v. American Motors Corp., 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citations and internal quotation marks omitted).

> Admittedly the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.

Waters v. Personnel, Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

On a purported appeal from an interlocutory order without the trial court's Rule 54(b) certification, "the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citations omitted).

Wing asserts the trial court's order deprived her of substantial rights in two ways: (1) it depletes the Trust *res* and mandates the immediate payment of a substantial amount of money; and, (2) it risks inconsistent verdicts or outcomes with the ultimate disposition of the wrongful distribution claim and on any potential recovery against Goldman Sachs for funds already distributed.

A. Substantial Right Affected

The first part of the interlocutory test is the right affected must be substantial. Goldman Sachs has distributed more than $2 million dollars from the Trust to Sellers and Cone for expenses and legal fees they incurred in opposing Wing's and Falls III's claims. In 2016, Wing and Falls III filed suit and distributions ceased in November 2017. The record before us is unclear whether Goldman Sachs resumed distributions to Sellers and Cone for their legal fees or otherwise after November 2017. Counsel for Goldman Sachs assert they have not been paid for defending the Trust since November 2017.

This Court has held:

> Remaining claims would jeopardize plaintiff's substantial right not only because it orders plaintiff to pay a not insignificant amount—$48,188.15—The Order appealed affects a substantial right . . . by ordering [Defendant] to make immediate payment of a significant amount of money; therefore this Court has jurisdiction over the Defendant's appeal pursuant to N.C. Gen. Stat. 1-277.

Beasley v. Beasley, 259 N.C. App. 735, 742, 816 S.E.2d 866, 872-873, (2018) (alterations, citations, and internal quotations omitted.)

As this Court stated in *Beasley*, Goldman Sachs has paid out far more than an "insignificant amount" in Trust funds for Sellers' and Cone's legal fees. The disbursements for legal fees and expenses already surpass $2 million dollars, more than forty times the amount this Court referenced in *Beasley* as "a not insignificant amount." *Id.*

Secondly, a ruling "purporting to determine who is entitled to money" affects a substantial right. *State ex rel. Comm'r of Insurance v. N. C. Rate Bureau*, 102 N.C. App. 809, 811, 403 S.E.2d 597, 599 (1991). In *Rate Bureau*, the Commissioner of Insurance failed to order the release of funds placed in escrow pending judicial review. "The Commissioner's order only determine[d] that the funds are not to be released now." *Id.* The Commissioner had placed a temporary freeze on the distribution of funds while the proper recipients were determined. As the freeze was temporary, this Court determined no injury had occurred. *Id.*

The opposite result occurred here. Wing's Motion to Freeze, if allowed, would have had the same temporary impact as the Commissioner's freeze in *Rate Bureau*. "The Commissioner's order does not purport to determine who is entitled to the money. For these reasons, we hold that the appeal is interlocutory." *Id.*

Unlike *Rate Bureau*, Goldman Sachs, as purported trustee, held Trust funds whose beneficiaries are in dispute, but nonetheless distributed funds to one group, while the Trust beneficiaries' case is pending. Wing contends she, Falls III, and his children are the proper beneficiaries of the Trust under the operative trust terms set forth in the 2011 Trust Agreement. If Wing and Falls III succeed in their challenges to the amendments to the Trust, the court's ruling on Defendants' Motion to Pay adversely affects their equitable interests in the disbursed and depleted assets of the Trust.

Wing also relies upon this Court's precedents in *Tanner v. Tanner*, 248 N.C. App. 828, 789 S.E.2d 888 (2016) and *Estate of Redden v. Redden*,

179 N.C. App. 113, 632 S.E. 2d 794 (2006). In *Tanner*, the plaintiff-husband moved $300,000 from his business account to his mother's bank account and separated from his wife two months later. *Tanner*, 248 N.C. App. at 829, 789 S.E.2d at 889. The defendant-wife alleged the plaintiff had anticipated the marital separation and the money distributed was marital property, properly included in equitable distribution. *Id.*

This Court applied the two-part test for an immediate appeal of an interlocutory ruling to determine if the mother-appellant's substantial rights were affected by the defendant's claim of substantial money for which appellant had ownership and control. *Id.* at 831, 789 S.E.2d at 890. The mother-appellant asserted her grounds for appellate review, quoting *Redden*: "The order appealed affects a substantial right of [mother-appellant] by ordering her to make immediate payment of a significant amount of money; therefore, this Court has jurisdiction over [mother-appellant's] appeal pursuant to N.C. Gen. Stat. § 1-277." *Tanner*, 248 N.C. App. at 831, 789 S.E.2d at 891 (citation omitted).

In *Redden*, decedent had executed a power of attorney in favor of his wife. He also designated his wife as the payable-on-death beneficiary of funds in a specific bank account. *Redden*, 179 N.C. App. at 114, 632 S.E.2d at 796. The wife testified decedent had instructed her to move $200,000 from the specific account to decedent's work account so she could proceed with office work on decedent's behalf. After the decedent died, his wife moved the remaining money she had transferred to the work account, back to her specific bank account. *Id.* at 115, 632 S.E.2d at 796. The plaintiff sued the wife on behalf of Redden's estate for conversion. The trial court granted partial summary judgment in favor of the plaintiff, and the wife appealed to this Court. *Id.* at 114, 632 S.E.2d at 797.

In both *Tanner* and *Redden*, this Court held a substantial right is affected when a payment is made or required and ownership of the funds is in dispute. *See Tanner*, 248 N.C. App at 831, 789 S.E.2d 890-91. Like *Tanner* and *Redden*, Wing also contests the payment of Trust funds over which there is a dispute to the rightful owners.

Defendants and Goldman Sachs rely upon workers' compensation and other two-party, duty-to-pay cases to argue no substantial right exists to an immediate appeal. This Court has consistently held in interlocutory appeals of workers' compensation and contract disputes "when a party has been required to make payments *pendente lite*, this Court has nonetheless held that no substantial right exists to justify an interlocutory appeal." *Perry v. N.C. Dep't of Corr.*, 176 N.C. App. 123,

130, 625 S.E.2d 790, 795 (2006). This is not a workers' compensation or a two-party, duty-to-pay case.

Defendants and Goldman Sachs rely on *Miller v. Henderson*, 71 N.C. App. 366, 368, 322 S.E.2d 594, 596 (1984) (allowing plaintiff to bring an interlocutory appeal because plaintiff faced a possibility of inconsistent verdicts and a partial summary judgment for a monetary sum, plaintiff's claim was dismissed as meritless and she was ordered to pay attorney fees). Our Supreme Court permitted the interlocutory appeal in *Miller* using the exact same reasoning Wing asserts in this case. The outcome of *Miller* required the plaintiff to pay attorney's fees because the statute required them to do so after allegations were found to be meritless. *Id.* at 372, 322 S.E.2d at 598. For our interlocutory analysis, *Miller* supports Wing's assertion, but the ultimate conclusion in *Miller* regarding plaintiff's duty to pay is easily distinguished from our facts. *Id.*

Goldman Sachs heavily relies on *Perry*, a workers' compensation case. In *Perry*, plaintiff-employee was injured, and defendant-employer paid the employee for a term, and then unilaterally ceased payment. *Perry*, 176 N.C. App. 123, 625 S.E.2d 790. Defendant was ordered to reinstate workers' compensation benefits to plaintiff, and defendant appealed with a motion to stay the payment order. The motion was denied. Defendant appealed to this Court for an interlocutory appeal asserting a substantial right. *Id.* at 127, 625 S.E.2d at 793. This Court stated: "an order denying a stay is an interlocutory order not subject to immediate appeal." *Id.* at 129, 625 S.E.2d at 794.

The ruling in *Perry* is inapplicable to the order before us. Wing and Falls III are not appealing from a motion to stay, but rather from an order affirmatively ordering payments by a trustee with distributions from a trust to some purported beneficiaries, and not others, when the rightful beneficiaries are disputed. This Court reasoned in *Perry* that workers' compensation cases create unique issues:

> These same circumstances arise in almost every case in which a workers' compensation defendant fails to prevail in connection with [a] request to terminate benefits. To allow a defendant to take an interlocutory appeal from any requirement that it continue to pay benefits pending Commission proceedings would result in precisely the yo-yo procedure, up and down, up and down, which this Court has held works to defeat the very purpose of the Workers' Compensation Act.

Id. at 130, 625 S.E.2d at 794. (alterations in original) (quotation marks omitted).

Finally, this Court noted: "When an employer meets the requirements of N.C. Gen. Stat. § 97-42 (2005), it may receive a credit for overpayments." *Perry*, 176 N.C. App. at 131, 625 S.E.2d at 795 (citation omitted). This available alternative is distinguished here, as Goldman Sachs claims it has no liability from distributing funds. If Wing prevails on her claims of wrongful distribution, no return of funds or credit to offset future payments is guaranteed. *Perry* and *Miller* differ substantially from the facts before us.

Further, in cases involving escrow, like *Rate Bureau*, cases involving constructive trust, like *Tanner*, or cases involving disputed distributions, like *Redden*, this Court has consistently held a substantial right is affected when the dispute is between claims of competing owners of funds to be distributed. Two million dollars was distributed from the Trust to Sellers and Cone, who may be held to be non-beneficiaries in the pending litigation. The order allowing Defendant's Motion to Pay diverts funds from the Trust, which would otherwise be held in the Trust and recoverable by the Wing, Falls III, and two of his children, if they prevail.

B. Deprivation Works Injury

The second part of the test for interlocutory appeals is whether the deprivation immediate appellate review works injury to the appellant. "[W]e may generally state that so long as a claim has been finally determined, delaying the appeal of that final determination will ordinarily affect a substantial right *if* there are overlapping factual issues between the claim determined and any claims which have not yet been determined." *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 26, 376 S.E.2d 488, 492 (1989).

Issues overlap whenever "the facts relevant to the resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts." *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 194, 767 S.E.2d 374, 376 (2014). The overlapping issues will work injury as inconsistent verdicts could deprive Wing and Falls III of their equitable interest in the Trust.

The wrongful distribution claim, along with all the pending claims, hinge upon undue influence and Decedent's capacity to execute the purported amendments. If Decedent lacked capacity to execute any or all amendments to the Trust, the purported amendments, together or singularly, are void; Sellers and Cone take nothing from the Trust, and Goldman Sachs breached their fiduciary duties to preserve the Trust *res*. The order allowing the Motion to Pay and the pending claims overlap substantially.

The rightful beneficiaries of the Trust are in dispute. Wing's and Falls III's substantial rights are affected by the large sums being distributed from the Trust. Further, the court's order does not clearly define the liability of Goldman Sachs. This creates the possibility of multiple trials on claims involving overlapping issues and could result in inconsistent verdicts. Immediate appeal to and review by this Court is proper, as this interlocutory order affects Plaintiffs' substantial rights. We allow Plaintiffs' interlocutory appeal.

III. Trustee's Duty to the Trust

A. Interpreting Trust Terms

[2] "The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property." N.C. Gen. Stat. § 36C-1-112 (2019). A caveat proceeding determines whether the writing purporting to be a testamentary will or a codicil thereto is in fact the last will and testament of the decedent. *See In re Spinks*, 7 N.C. App. 417, 423, 173 S.E.2d 1, 5 (1970). If "a caveat is filed the clerk of the superior court shall forthwith issue an order that shall apply during the pendency of the caveat to any personal representative, having the estate in charge, as follows: (1) . . . *[T]here shall be no distributions of assets of the estate to any beneficiary*." N.C. Gen. Stat. § 31-36 (2019) (emphasis supplied).

Our general statutes compel us to interpret wills' and trusts' provisions and dispositions consistently. N.C. Gen. Stat. § 36C-1-112 (2019). N.C. Gen. Stat. § 31-36(a)(1) provides the framework for the case before us. Plaintiff's' challenge of the purported amendments is comparable to a caveat to determine who the rightful beneficiaries should be. The plain text of the statute directs the clerk of the superior court to order the executor or administrator to freeze all distributions until the caveat is resolved.

Wing filed a will caveat in the superior court on 13 November 2017. Wing also challenged the probated will on the basis of Decedent's incapacity and Seller's purported undue influence. Upon filing her caveat, "any personal representative, having the estate in charge . . . *shall [make] no distributions of assets of the estate to any beneficiary*." N.C. Gen. Stat. § 31-36(a)(1) (emphasis supplied).

B. Duty of Neutrality

In August 2011, Decedent created the Trust and thereafter purportedly amended the trust six times in less than two years between 2012

and 2014 after having undergone surgery for multiple brain tumors. Decedent wrote, "This amendment amends and restates in its entirety the trust originally executed by me on August 4, 2011." This phrase is found at the top of each purported amendment, incorporating the Trust as purportedly amended.

Goldman Sachs argues a trustee has a duty to defend the Trust. The first issue is whether a trustee has a duty to defend the purported amendments during pending litigation between purported beneficiaries. Wing and Falls III are not challenging the underlying validity of the Trust. They are challenging the trustor's capacity to execute the amendments thereto and to determine the rightful beneficiaries of their father's Trust.

Aside from the guidance and mandates of N.C. Gen. Stat. §§ 31-36 and 36C-1-112, the trustee's duty of and liability for distribution to disputed beneficiaries during pending litigation is an issue of first impression in North Carolina. Other jurisdictions have considered similar factual scenarios.

In *Terry v. Conlan*, the trustor's children challenged their stepmother regarding the validity of trust amendments. *Terry*, 33 Cal. Rptr. 3d 603 (Cal. Ct. App. 2005). The California Court of Appeals concluded, "The dispute between [Stepmother] and the Children is over the validity of the various trust instruments and amendments . . . The trust remains intact, leaving the parties in their original positions prior to the beginning of litigation." *Id.* at 616. The court in *Terry* held, "[B]ecause the dispute between the parties was related to the benefits of the trust, rather than an attack on the validity of the trust itself, there was no basis for the trustee to have taken other than a neutral position in the contest." *Id.* at 615.

In another case with similar facts to Wing, the decedent and his wife created a trust which named their niece, Whittlesey, as the trustee and primary beneficiary. *Whittlesey v. Aiello*, 128 Cal. Rptr. 2d 742, 743 (Cal. Ct. App. 2002). The wife died, and decedent remarried and amended the trust to make his second wife and her son the primary beneficiaries of the trust. *Id.* Whittlesey challenged the validity of the amendment and opposing attorney's claim he should be paid from the trust. The amendment was determined to be void due to undue influence, and the attorney's fees incurred during litigation were denied *Id.* at 744.

The California Court of Appeals held: "Where the trust is not benefited by litigation, or did not stand to be benefited if the trustee had succeeded, there is no basis for the recovery of expenses out of the trust assets." *Id.* at 748. The court further ruled, "The essence of

the underlying action was not a challenge to the existence of the trust, it was a dispute over who would control and benefit from it. Whether or not the contest prevailed, the trust would remain intact." *Id.* at 746. The court reasoned the dispute was to determine who was the rightful taker, so the trust would not be affected negatively, and thus the trustee did not have a duty to take either position. *Id.* at. 748.

The court's reasoning is persuasive: "[A]n award of fees to [attorney defending second wife] from the trust would be, in effect, an award from Whittlesey . . . Whittlesey would be required to finance her own trust litigation and that of her opponent, despite the fact she prevailed. There can be no equity in that." *Id.* (internal quotations omitted).

Wing's position is similar to *Whittlesey*. Goldman Sachs asserts attorney's fees are "costs of administration" and a valid expense if incurred by the trustee while defending the Trust. *See Phillips v. Phillips*, 296 N.C. 590, 603, 252 S.E.2d 761, 769 (1979). The Trust does not need defending in the case before us because there is no contest to the validity of the Trust. This dispute is between the rightful beneficiaries, and the Trust is not in peril. Goldman Sachs has breached their duty of neutrality by deciding who the rightful beneficiaries are before pending litigation has resolved that issue.

Many other states have also held a trustee has a duty to remain neutral regarding competing claims between putative beneficiaries. *See In re Duke*, 305 N.J. Super. 408, 440, 702 A.2d 1008, 1023-24 (Ch. Div. 1995) (holding in a dispute between two parties claiming to be beneficiaries, a trustee may not advocate for either side or assume the validity of either side's position."); *Dueck v. Clifton Club Co.*, 2017-Ohio-7161, 95 N.E.3d 1032, 1059 (Ohio Ct. App. 2017) (holding a trustee "breached the duty of impartiality by engaging in advocacy between the beneficiaries"); *In re Connell Living Trust*, 393 P.3d 1090, 1094 (Nev. 2017) (holding a trustee breached fiduciary duties by advocating for a position which benefitted some putative beneficiaries but not others); *Hershatter v. Colonial Trust Co.*, 73 A.2d 97, 101 (Conn. 1950) ("[W]here an attack is being made upon the validity of a trust, the trustee has the duty of participating actively in its defense . . .[but where] he acts . . . merely as a defendant stakeholder, he ordinarily has neither duty nor right to so participate"). We have found no cases arising on similar context and facts, which reach a contrary result.

IV. Conclusion

"A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and

other circumstances of the trust." N.C. Gen. Stat. § 36C-8-804 (2019). A prudent trustee must act impartially towards all purported beneficiaries. N.C. Gen. Stat. § 36C-8-803 (2019). Here, the Trust does not require defending, rather, as purported beneficiaries, Defendants seek to use Trust assets to maintain their positions. The trustee is not required to pay attorney fees or legal costs unless the *res* of the Trust is in peril. *See Whittlesey*, 128 Cal. Rptr. 2d at 743.

Wing's substantial rights are affected by the large sums distributed to competing beneficiaries, which could belong to Wing, Falls III and his children with potentially no way to recover the wrongful payments. The Motion to Pay order creates the possibility of multiple trials on claims involving overlapping issues, which might result in inconsistent verdicts. Immediate appeal of this interlocutory order to this Court is proper.

The beneficiaries of the Trust are in dispute. There is no final determination of who are the rightful beneficiaries. In accordance with the general statutes and precedents, the trial court should have allowed Plaintiff's motion and ordered a freeze on distributions of the Trust assets until resolution of the competing claims.

The trial court erred by not freezing and by ordering distributions from the Trust to some putative beneficiaries but not others during pending litigation. We reverse the Motion to Pay order and remand to the trial court for entry of an order allowing Wing's Motion to Freeze. All remaining claims, rights, and defenses are undisturbed. *It is so ordered.*

REVERSED AND REMANDED.

Chief Judge McGEE and Judge COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 OCTOBER 2020)

BELNAP v. SHALLCROSS No. 20-266	Johnston (12E23)	Affirmed
KIRBY v. MISSION HOSP., INC. No. 19-525	N.C. Industrial Commission (13-758570)	Affirmed
STATE v. BATTLE No. 19-677	Wilson (17CRS52334)	Vacated
STATE v. BRYANT No. 20-14	Iredell (18CRS50097) (18IFS700124-125)	No error; remanded for resentencing
STATE v. COOPER No. 18-637-2	Beaufort (11CRS50617)	Reversed
STATE v. ELLIS No. 19-820	Davidson (16CRS1704) (16CRS50958) (16CRS50960) (17CRS1950)	No error in part; Dismissed in part.
STATE v. FARRIOR No. 19-1137	Onslow (17CRS53172)	Vacated and Remanded
STATE v. GONZALEZ No. 20-120	Franklin (17CRS50297)	Dismissed
STATE v. MUHAMMAD No. 19-590	Mecklenburg (16CRS231894)	No Error
STATE v. PARKER No. 19-719	Catawba (17CRS932)	No Error
STATE v. PRUITT No. 19-694	Haywood (16CRS50980) (17CRS863)	No Error
STATE v. SUTHERLAND No. 19-637	Wake (16CRS220966-69) (16CRS221104)	No Error
STATE v. WALKER No. 20-35	Vance (17CRS52287) (17CRS52289) (17CRS52386-88) (17CRS705)	DISMISSED IN PART, REVERSED AND REMANDED IN PART.

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS